

CRYSTAL LAGOONS U.S. CORP.,)
Plaintiff,)
vs.) Case No. 2:19-CV-796BSJ
CLOWARD H20,)
Defendant.)
_____)

Claim Construction Hearing

A P P E A R A N C E S

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1 September 2, 2021

10:00 a.m.

2 P R O C E E D I N G S

3
4 THE COURT: Good morning.

5 Why don't we go ahead in Crystal Lagoons U.S.
6 Corp. versus Cloward H2O. It is 2:19-C-796, here today
7 calendered as a construction hearing to consider the
8 concerns of each of the parties.

9 Those who are making appearances, if you will be
10 good enough to make a record and tell us who you are and
11 whom you represent.

12 To begin with I note that counsel had asked for a
13 client to be able to Zoom in and that is fine. I should
14 point out, of course, that the only record made is that by
15 the official court reporter. So there is no recording on
16 the part of anybody other than the official court reporter.
17 It is that understanding that the Court has in reference to
18 those who observe.

19 At any rate, those who are here as counsel for the
20 litigants, if you will again make a record for us and tell
21 us who you are and whom you represent.

22 MR. ZEULI: Good morning, Your Honor.

23 I am Tony Zeuli from the law firm of Merchant and
24 Gould. I represent the plaintiff Crystal Lagoons in this
25 matter. With me today as attorneys are Karen Beckman from

1 my law firm and also James Watson, local counsel from the
2 Trask Britt firm. To my right is a client representative,
3 Fernando Fishman, who is the owner and president of Crystal
4 Lagoons and also the inventor in this case.

5 THE COURT: Okay. Thank you.

6 MR. ZEULI: Thank you.

7 MR. BRAITHWAITE: Good morning, Your Honor.

8 Jared Braithwaite on behalf of Cloward H20,
9 L.L.C., the defendant. With me today is the president of
10 Cloward H20, Cory Cloward. I also have from my firm Alexis
11 Juergens accompanying me.

12 THE COURT: Okay. We're concerned, as you know,
13 today primarily about language and the adequacy of language
14 and the clarity of language. We're not dealing with any
15 subject other than the language and the adequacy of the will
16 claims as written to adequately convey the alleged claim and
17 the extent of the claim of the inventor.

18 I think procedurally it would make sense if we had
19 the defendant begin today. In looking at the language,
20 we're all concerned with whether or not the language
21 adequately conveys information. The information has to do
22 with both the structure and the process and the application.
23 Our job is to look at the language and our job today is not
24 to construe the application of the language to the process
25 or to the structure or the related matters. Our job is to

1 see if the language as language conveys information that is
2 agreeable with the recipient here, the reader, so that we're
3 talking about the same subject.

4 So I think it would be appropriate under the
5 circumstances, looking at the questions raised, if the
6 defendant took time to deal with his concern, if there is a
7 concern, with the language that is of concern to him, after
8 which we'll deal with the first concern. We'll have the
9 defendant respond -- that is the plaintiff respond through
10 counsel, and then we'll deal with the second one and we'll
11 deal with each one as we go, so that we can identify what
12 defect or flaw or need may exist for clarity and simplicity
13 so that we're all talking about the same thing.

14 So, counsel, why don't you start.

15 MR. BRAITHWAITE: Thank you, Your Honor.

16 Permit me a moment. To the extent anything visual
17 is needed, it will come out on the overhead.

18 THE CLERK: I think you're going to have to take
19 your mask off. Thank you.

20 MR. BRAITHWAITE: Good morning, Your Honor.

21 As I understand what the Court is asking, is we're
22 not concerned today about applying the claims to the accused
23 product, but rather determining what the meaning of claim
24 terms are.

25 THE COURT: That is right.

1 MR. BRAITHWAITE: And so I think the most
2 important aspect of this case is context.

3 THE COURT: I agree with you. So it is.

4 MR. BRAITHWAITE: That is what we're doing here on
5 claim construction. The seminal cases on claim construction
6 are the Markman case and the Phillips case, Markman from the
7 Supreme Court establishing the procedure for claim
8 construction, and Phillips from the Federal Circuit talking
9 about what courts should generally look at, because the task
10 here today is to understand what those of skill in the art
11 would come to understand by reading the patent and reading
12 the claims to understand what it is supposed to cover.

13 THE COURT: I'm always interested in what skill
14 and what art.

15 MR. BRAITHWAITE: What we proposed, Your Honor, is
16 that the person of skill in the art is someone with a
17 bachelor's degree in civil engineering that would be
18 familiar with and have some experience in building
19 recreational water facilities, whether they be large
20 swimming pools, large wave pools, things of that nature.
21 There are kayaking training facilities and --

22 THE COURT: I want you to focus on the words of
23 the specific claims that you say are in need of some help.

24 MR. BRAITHWAITE: I understand.

25 The first one I think that we briefed and that

1 we're going to address is the term walls. What would a
2 person of skill in the art understand is a wall or would be
3 encompassed within the meaning of the term wall. Again,
4 this is where context is important, because I can talk about
5 a long day in court and it is 6:00 in the afternoon and I
6 have hit a wall. Well, I have not literally run into a
7 wall. It is a form of speech to say that I'm tired and I'm
8 exhausted.

9 So in one context such as exhaustion, wall might
10 mean some sort of ethereal term of exhaustion, but that is
11 not what we are talking about. We're talking about
12 recreational water structures. What does wall mean in that
13 context? What the court said is ultimately the
14 interpretation of a term can only be determined and
15 confirmed with the full understanding of what the inventor
16 actually invented and intended to envelope with the claim.
17 The construction stays true to the language and most
18 naturally aligns with the patent's description of the
19 invention will be in the end the correct construction.

20 Another aspect of what we're not doing today is
21 looking at what --

22 THE COURT: What don't you understand about wall?

23 MR. BRAITHWAITE: Let's move on to wall directly.

24 THE COURT: That is what you're focusing on.

25 MR. BRAITHWAITE: Yes. Correct, Your Honor.

1 The context for this dispute and why it is even an
2 issue for the Court to decide and determine what wall means
3 is because on the one hand Crystal Lagoons' interpretation
4 in this case has been that wall can be anything. It can be
5 any surface of a water structure. It could be the wall. It
6 could be the floor. It could be another portion of the
7 floor. It could be the sloped floor. It could be any
8 surface, and that does violence to the terms of the claims
9 and is counter to the description of the patent and is not
10 how anyone of skill in the art would understand the term
11 wall.

12 That is why it is an issue is that the decision
13 point for the Court is is the scope of the word wall
14 anything, including the floor, or is it --

15 THE COURT: Well, why don't you describe your
16 understanding of the structure.

17 MR. BRAITHWAITE: Our understanding starts with
18 the plain and ordinary definition that would be given by any
19 layperson and that is consistent with how a person of skill
20 in the art would view wall. I have a wall on the left hand
21 and I have a wall over here and I have a wall behind Your
22 Honor in the --

23 THE COURT: I understand that the function is
24 contextual. Tell me your understanding of the context of
25 the use of the term here.

1 MR. BRAITHWAITE: So the context of recreational
2 water structures -- we can look at how people of skill in
3 the art use these terms. In particular, before this case
4 was ever filed, the defendant here, Cloward H20, used the
5 term wall and the term floor in their plans for the accused
6 product. The wall is the vertical sidewalls to the
7 structure and the floor is the bottom, what people would
8 walk on, and that is a distinction that others of skill in
9 the art would make as well.

10 What we have, on the other hand, from Crystal
11 Lagoons is one of their employees, Ms. De la Cerda, she
12 submitted a declaration saying wall is broader than that.
13 Look, I found a paper about bioswells --

14 THE COURT: No. Why don't you just tell me your
15 trouble -- your trouble, if there is trouble, with wall.
16 Are we talking about the sides, the sides of the structure,
17 the pond, the lake, the lagoon --

18 MR. BRAITHWAITE: That is --

19 THE COURT: -- the depression? What are we
20 talking about?

21 MR. BRAITHWAITE: What we're talking about when we
22 say wall, and what we think all those of skill in the art
23 would understand by wall is the sides, the vertical sides.

24 THE COURT: That is your impression. Okay. Now
25 does the claim say that?

1 MR. BRAITHWAITE: Yes, the claims do say that.

2 THE COURT: Well, you don't have any trouble then
3 with that, do you?

4 MR. BRAITHWAITE: Well, yes. It is a dispute
5 because --

6 THE COURT: It might be a dispute, but it is a
7 dispute down the road. It is not a dispute on claim
8 construction. It says what it says.

9 MR. BRAITHWAITE: I agree, Your Honor, and that is
10 how the claim should be approached, but the problem we have
11 in this case is a dispute over the term scope of the wall.

12 THE COURT: Well, scope is a different question.
13 Meaning is what we're concerned with. We're concerned with
14 the use of words and what the word conveys, what is behind
15 the word.

16 MR. BRAITHWAITE: Exactly. That is where the
17 parties have a dispute and that is the function of the Court
18 during claim construction to decide which understanding of
19 the term is correct.

20 THE COURT: Well, your understanding is sides.

21 MR. BRAITHWAITE: Yes, the substantial vertical
22 sides of the --

23 THE COURT: I don't know where substantial comes
24 from, but I understand your suggestion that --

25 MR. BRAITHWAITE: Yes, the sides.

1 THE COURT: Okay. I will hear from them as to
2 their attitude toward your suggestion as to the
3 interpretation to make sure that you're operating on the
4 same wavelength.

5 MR. BRAITHWAITE: Yes. That is what we're trying
6 to do here, and what I have prepared is to really show that
7 those of skill in the art consistently do not understand a
8 wall to refer to the floor, the bottom, what people walk on.

9 THE COURT: I don't have any trouble with that
10 concept, frankly. Language is what it does and language has
11 inherent defects, and I just want to make sure that you're
12 talking about the same thing. If they want to suggest that
13 a wall refers to something other than the sides, let them
14 put that pitch.

15 MR. BRAITHWAITE: I understand, Your Honor, that
16 that question is technically teed up in our motion for
17 summary judgment next month and we are not addressing that
18 here today.

19 THE COURT: No, we are not.

20 MR. BRAITHWAITE: But I think what we're trying to
21 do, and I will get on that same page so we have a common
22 definition so in October when we approach that question
23 there are not disputes where Crystal Lagoons is still
24 saying, well, the floor can be a wall or the term wall --

25 THE COURT: Well, let's see what happens.

1 As you suggest and the function of language, and
2 it is one of the odd things in the rules that suggest
3 construction prior to the time that we engage in summary
4 judgment or at the time we engage in pretrial, but I
5 understand your suggestion.

6 What is your next term besides wall?

7 MR. ZEULI: Excuse me, Your Honor. I think the
8 parties had agreed, if it is okay with the Court, that we
9 were going to go term by term.

10 THE COURT: Yes, we're going to do it term by
11 term, but my question is what is your next term?

12 MR. BRAITHWAITE: The next term would be covered
13 with a plastic liner made of nonporous material able to be
14 thoroughly cleaned.

15 THE COURT: Now we're going to have counsel take a
16 moment and talk about walls.

17 MR. BRAITHWAITE: Thank you.

18 MR. ZEULI: Good morning, Your Honor. Again, I'm
19 Tony Zeuli. I represent the plaintiff in this case.

20 Before I talk to you about walls, may I remove my
21 mask?

22 THE COURT: Yes.

23 MR. ZEULI: Thank you.

24 I failed to introduce, when we started this
25 morning, Bill Hamilton. Bill is seated right behind me and

1 Bill is a trial graphic specialist and he will be running
2 the PowerPoint. If the court would be kind enough to switch
3 over to the plaintiff's side, we will get talking about
4 walls.

5 I also wanted to ask, and perhaps your assistant
6 is dealing with this, but our client representative who is
7 on the Zoom is unable to hear. We are wondering if there is
8 a microphone switch that would allow her to hear the
9 proceedings?

10 THE COURT: Is she the one viewing from outside?

11 MR. ZEULI: Yes, sir.

12 THE COURT: Okay. Kim, have we got something that
13 would be helpful?

14 THE CLERK: We're trying to keep it on.

15 MR. ZEULI: Thank you very much for trying. We
16 will go ahead and proceed and if you are able to join her,
17 wonderful, but, otherwise, I will talk to you.

18 THE CLERK: Our I.T. guy is going to come up.
19 They are there, but I don't know why it is muted.

20 MR. ZEULI: Thank you very much for looking.

21 THE CLERK: We are doing the best we can right
22 now.

23 MR. ZEULI: Thank you very much. It is greatly
24 appreciated. If we could switch the dial to the plaintiff's
25 side, we will put our presentation up.

1 While that is coming up, Your Honor, I just want
2 to talk about a couple of things that the Court mentioned.

3 THE CLERK: I think we're good, Judge.

4 THE COURT: Okay.

5 MR. ZEULI: Good.

6 You know, one of the things Your Honor said is is
7 there a defect in the patent? Do we need to address the
8 clarity or simplicity? I believe at an earlier hearing the
9 Court talked about when we got to this day that we would
10 look to see was there ambiguity or confusion in the patent
11 and the answer to that is no, there is not.

12 THE COURT: Okay.

13 MR. ZEULI: Defendants, as is often the case in
14 these patent litigation cases, will raise claim construction
15 issues with the hopes of creating a noninfringement defense.
16 The way that it works quite simply is that they take a look
17 at something that is fairly straightforward on their product
18 and they say, well, look, our liner, which we'll talk about
19 next, or our walls are not vertical or they are wrinkly. If
20 we can get the Judge to require that this word, wall, that
21 is not modified by vertical, get them to change that, then
22 we have got a defense.

23 The same thing with liner. They are wrinkly. If
24 we can get the Judge to say that the liner can't be wrinkly
25 and it has to be smooth or uniform, then they have a

1 defense. I think the Court was correct in thinking about
2 this problem in the way that it does.

3 Let's look at the patent. What does the patent
4 tell us, because that is the intrinsic evidence. Those
5 cases that Mr. Braithwaite cited to you, Phillips and
6 Markman, that is what they talk about. First we're going to
7 look at the intrinsic evidence. Let's look to see what the
8 intrinsic evidence says.

9 The word in the patent claim is walls. They want
10 to add the word substantially vertical.

11 THE COURT: Well, it is nonexistent and I
12 understand that, and as far as those words are concerned,
13 we're stuck with what is there, and the question is what
14 does that mean in the context of what we're talking about.

15 MR. ZEULI: It is a simple word that jurors will
16 understand. It is a common English term that needs no
17 definition.

18 THE COURT: You say it is plain and ordinary.

19 MR. ZEULI: Plain and ordinary.

20 THE COURT: I say the same thing and there is no
21 construction necessary.

22 Let's move on to the second one.

23 MR. BRAITHWAITE: Thank you, Your Honor.

24 The next term is covered with a plastic liner made
25 of a nonporous material able to be thoroughly cleaned. Now,

1 using the words of the claim, because this is where it
2 matters, first it falls in the context of the claim, and
3 there on about line 5 what it describes is a bottom and
4 walls covered with a plastic liner made of a nonporous
5 material able to be thoroughly cleaned. I think the issue
6 here is what does covered mean, especially in light of the
7 intrinsic evidence of the patent and the prosecution history
8 as described by the inventor and what doesn't it refer to.

9 So when it talks about the bottom covered with a
10 plastic liner, that is distinguishing the floor of the
11 structure from the sides, the walls covered with a plastic
12 liner. But the purpose for it being covered is so that it
13 can be cleaned. So on the one hand we're dealing with in
14 this case a question of whether covered means not covered,
15 it means plastic that is not exposed and that can't be
16 cleaned.

17 The plain and ordinary meaning of able to be
18 cleaned and --

19 THE COURT: Let me ask a direct question. We're
20 talking about claims and we're talking about a description
21 of the use of a plastic material at a particular location.

22 Is there some ambiguity on that?

23 MR. BRAITHWAITE: There is because of how the
24 patent applicant described it. Crystal Lagoons has noted
25 that we want the Court to construe it as a uniform plastic

1 liner, and Crystal Lagoons has gone on at length about
2 wrinkles. This has nothing to do with wrinkles.

3 Here is the issue, Your Honor, is during the
4 prosecution of this patent, so as the patent applicant was
5 engaged in a back-and-forth with the patent office, a
6 question came up over what does this cover and does it not
7 cover. The examiner used a piece of prior art, something
8 that predated the patent called the Cant patent.

9 THE COURT: Yes. That is the --

10 MR. BRAITHWAITE: So the patent examiner said,
11 hey, look, here is a pool and it would have been obvious to
12 put a plastic liner on the bottom so you don't get a patent.
13 What the patent applicant said in response is important and
14 provides context for what the patent applicant meant by
15 plastic liner that is able to be thoroughly cleaned.

16 I have put on the screen what the patent
17 application submitted to the patent office and their
18 argument in response was, therefore, the system disclosed by
19 Cant is incompatible with the present invention, as the
20 present invention includes a bottom covered with a plastic
21 liner that is able to be thoroughly cleaned, whereas the
22 spray jets located in the bottom of the structure disclosed
23 by Cant would not allow for normal functioning of a bottom
24 cleaning device.

25 Spray jets that interrupt the plastic liner, and

1 that is what we mean by uniform, and if there are spray jets
2 or inlets that interrupt the plastic liner, the patent
3 applicant says then you can't thoroughly clean the bottom.
4 So that is what makes us different than Cant and that is why
5 we should get a patent.

6 THE COURT: We don't have jets.

7 MR. BRAITHWAITE: We are dealing with jets, Your
8 Honor.

9 THE COURT: Are we talking about the Cant claim?

10 MR. BRAITHWAITE: No, we are not talking about the
11 Cant claim. We are talking about the claims in the 514
12 patent and --

13 THE COURT: Are there jets there?

14 MR. BRAITHWAITE: No, there are not.

15 THE COURT: We're talking about an absence of
16 jets?

17 MR. BRAITHWAITE: Correct.

18 They need to be absent, because the patent
19 applicant said if there are inlets and jets, our claims
20 don't cover it and that is what makes us different than
21 Cant.

22 THE COURT: Well, okay. So what?

23 MR. BRAITHWAITE: The liner on the bottom -- that
24 is what we're asking the Court to decide is that the liner
25 on the bottom then needs to be uniform. That is what is

1 actually claimed is a uniform plastic liner. If the plastic
2 liner is interpreted as being broken up by spray jets and
3 inlets, then the recapturing ground that they gave up before
4 the patent office, and that is part of our function on claim
5 construction is to say a person of skill in the art who read
6 the patent and read the prosecution history would not
7 understand that a plastic liner on the bottom that is broken
8 up all over the place with inlets and jets is a plastic
9 liner that is able to be thoroughly cleaned.

10 THE COURT: Okay. So what?

11 MR. BRAITHWAITE: Well, and it is not the question
12 for today, but when we move down the line --

13 THE COURT: Well, let's look at it down the line.
14 Let's look at the questions for today.

15 MR. BRAITHWAITE: Your Honor, the interpretation
16 point, the claim interpretation point is what the claims
17 say. Is the liner able to be thoroughly cleaned?

18 THE COURT: Sure.

19 MR. BRAITHWAITE: And so inherent in that term is
20 it can't be broken up with inlets and spray jets.

21 THE COURT: Ultimately we'll talk about whether
22 there is a violation here or whether there isn't.

23 MR. BRAITHWAITE: Correct.

24 THE COURT: They either suggest that your
25 defendant has in some fashion infringed or he hasn't. Okay.

1 That is contextual it seems to me and that is application it
2 seems to me, and I think people understand in reading what
3 is there that the impervious plastic liner does what it does
4 at a particular location.

5 MR. BRAITHWAITE: Right.

6 What we're trying to resolve, Your Honor, is down
7 the road revisiting this idea of claims scope, because here
8 is how I see things playing out. We come to October and
9 then we're faced with arguments by Crystal Lagoons that,
10 hey, a plastic liner able to be thoroughly cleaned, that can
11 include spray jets all over the place. So they will be
12 arguing --

13 THE COURT: Well, let's see if they make that
14 argument. Let's not anticipate their argument. You're
15 pointing out that the plastic liner needs to comply with
16 what it says it is complying with.

17 MR. BRAITHWAITE: That is correct, Your Honor.

18 THE COURT: And that is pretty plain, isn't it?

19 MR. BRAITHWAITE: I believe it is.

20 Here is the problem on claims construction. A lot
21 of times party A comes to the court and says we have the
22 plain and ordinary meaning, and party B comes to the court
23 and says we have --

24 THE COURT: Well, that only exists if there is an
25 ambiguity in the language that requires the so-called expert

1 help, the so-called those skilled in the art. Actually an
2 ordinary soul can read something and have an opinion
3 concurrent with the same opinion of one so-called skilled in
4 the art. It is a matter of meaning and it is a matter of
5 having the symbols represent in your head and in his head
6 and in my head what it is that we're talking about. What
7 you're insisting here is that they need to have a plastic
8 liner that does what they say it does.

9 MR. BRAITHWAITE: Correct. And so --

10 THE COURT: Let's see if he says they have got it
11 and what --

12 MR. BRAITHWAITE: So on the defense side, in our
13 head the term covered by a plastic liner able to be
14 thoroughly cleaned means what we're envisioning is that it
15 is a uniform liner. It is not broken up by spray jets and
16 inlets and things. I think on this side it is already
17 pretty well established in the papers that on Crystal
18 Lagoons' side they are thinking in their head, no, it can
19 have holes all over the place for spray jets and inlets.

20 THE COURT: Well, let's see what they say.

21 MR. BRAITHWAITE: Okay. I think that is what
22 we're trying to resolve today.

23 THE COURT: Okay.

24 MR. ZEULI: The Federal Circuit and the Court of
25 Appeals is where all these cases ultimately end up, right,

1 and this one is probably headed there, too. Most patent
2 cases I have been involved with over my 25 years, if claim
3 constructions are involved, we're going to the Court of
4 Appeals. The Court of Appeals confirmed exactly what Your
5 Honor just said, that the ordinary meaning can come from
6 people like laypersons, including lay judges, and the term
7 may be readily apparent even to lay judges. I think Your
8 Honor understands that really what we have is an issue of
9 application, not of construction.

10 THE COURT: Yes.

11 MR. ZEULI: The claim says plastic liner. We're
12 going to be arguing about whether their plastic liner,
13 because they certainly have a plastic liner, infringes that
14 limitation, but that is in October. What they are asking
15 you to do today is insert an adjective before plastic liner
16 that --

17 THE COURT: Tell me about your plastic liner.

18 MR. ZEULI: Yes. I would like to tell you about
19 that.

20 THE COURT: I am interested in what it lines.
21 Does it line the whole expanse?

22 MR. ZEULI: It really --

23 THE COURT: Is it placed on everything?

24 MR. ZEULI: Yeah, it pretty much really does.

25 Let me explain why. Before we talk about -- let

1 me just show you one thing and then I want to talk to you
2 about that, because I think it is really helpful.

3 I didn't bring my clicker. Bill, could you go to
4 the second slide on this?

5 I just wanted to point out to the Court, if you
6 can see the screen, is that the claim language just says
7 covered with a plastic liner. They want to insert this
8 adjective uniform.

9 THE COURT: Well, I understand that.

10 MR. ZEULI: What really is uniform? He was
11 talking about jets. I don't know what uniform means. Now
12 we have got a --

13 THE COURT: You don't use jets, I take it?

14 MR. ZEULI: We do use jets. In fact, I'm going to
15 show you that.

16 Let's go first to slide number one.

17 Here is one of the Crystal Lagoons. One of the
18 things I have talked to this Court about many times when we
19 look at this beautiful picture and you see this multi-acre,
20 gigantic --

21 THE COURT: I understand the size and I am
22 fascinated by the whole process, but I am interested in the
23 claim.

24 MR. ZEULI: The liner is key. The liner is key,
25 Judge. That is the question I wanted to answer. What is

1 different between this and a traditional pool? One of the
2 key differences is with a traditional pool you dig a hole
3 and you put thick concrete walls and structure in there.
4 This does not do that. What they do, and you can kind of
5 see it in this picture, is they grade the soil --

6 THE COURT: I understand that.

7 MR. ZEULI: -- and then they take a tarp, a
8 plastic material like a tarp and they cover the entire
9 expanse.

10 THE COURT: People do that in their backyard
11 swimming pools. I understand that.

12 MR. ZEULI: Here is what they are not able to do.
13 They are able to maybe create that structure, and there were
14 tarps and there were plastic liners that were used in lakes.

15 Maybe, Bill, you can even bring up the lake
16 picture and show the Judge how murky those are.

17 What Crystal Lagoons created was additional
18 structure that made that water look like tropical seas, that
19 made that water blue. What was that additional structure?
20 This all goes to the liner and I am going to bring it all
21 back to the jets.

22 What we do is when you put the water over the
23 liner, right, the liner has to be able to support the water,
24 but then you have got to have the skimmers and the suction
25 device to clean that liner, because what happens is the

1 sunlight is coming through the water and it is reflecting
2 off of the liner which needs to be clean so that the water
3 looks like that. That is what the lakes that you remember,
4 or maybe on a golf course, didn't have. There might have
5 been a black tarp that they laid down or a plastic liner.
6 They weren't either white or blue or clear.

7 THE COURT: Well, you can have a colored plastic
8 liner.

9 MR. ZEULI: Right.

10 THE COURT: Okay. I understand that.

11 MR. ZEULI: Bill, could you go to -- let's start
12 with figure ten of the 514 patent.

13 What they are asking you to do -- again, the claim
14 is not ambiguous. We can talk about their plastic liner and
15 our plastic liner. Our plastic liner has jets. This is
16 figure ten from the 514 patent, and if the Court looks on
17 the left, and Bill is pulling it up, you can see that 41 is
18 the water. 39 is the recycling pipe. 40 are the jets.

19 THE COURT: How do you reconcile that with the
20 patent history? Counsel suggests that folks pointed out to
21 the patent office that the infusion of jets would be of some
22 difficulty.

23 MR. ZEULI: No, not at all. In fact, that is
24 totally taken out of context.

25 If we could bring up --

1 THE COURT: Well, why don't you tell me what is
2 wrong with that argument of counsel.

3 MR. ZEULI: I will.

4 I think you understood how Cant and that patent
5 worked. It had these jets in it, but it was used for the
6 exact opposite purpose. I just got done telling you that in
7 the invention the way that the liner is cleaned is that the
8 sediment and the soot is vacuumed off of that liner. So all
9 of the liner that is exposed needs to be cleaned so the sun
10 can reflect.

11 Cant had a totally different idea. What Cant did
12 is it took jets on the sides only and blasted water down
13 onto the bottom and it stirred up that water.

14 In fact, maybe you can bring up figure three of
15 Cant so the Judge can see it.

16 It stirred up that water and the sediment went up
17 and then it was skimmed off the top. So you got the bottom
18 cleaning invention versus the top cleaning, Cant. The
19 problem is you have got -- the psi of those jets in Cant is
20 20 psi and there were a lot of them, so it would be like
21 having a bunch of garden hoses on full, firing at --

22 THE COURT: Where can I find reference to jets in
23 the patent claims?

24 MR. ZEULI: No, it is not in the patent claims.
25 It is in --

1 THE COURT: Are there claims for jets in the
2 patent claims?

3 MR. ZEULI: In the claims I don't think we have
4 jets, but the jets can be found at column 9, lines 63 to
5 about 65.

6 THE COURT: Of what?

7 MR. ZEULI: Of the 514 patent.

8 Can I read it to you?

9 THE COURT: Yes, please.

10 MR. ZEULI: Maybe Bill can bring this up.

11 It is column nine of the 514 patent beginning at
12 line 63.

13 This is describing the picture that we just saw.
14 The structure has a pipe network with injectors that allow
15 an efficient application of products and water
16 homogenization. That is what it is describing in that
17 picture.

18 The liner does not need to be -- I don't even know
19 what uniform is, Judge. That is the question for today. Do
20 you need to add that adjective? Not today. That is a
21 factual issue. It is not a claim construction issue. The
22 claim with regard to the plastic liner is very clear. There
23 is nothing that happened in the prosecution history that
24 would say you can't have jets. The vacuums that go along
25 this plastic liner go right over jets and all sorts of other

1 structures.

2 Maybe we could bring up for the Judge -- let's
3 bring up slide 56.

4 Plastic liners are not uniform, not theirs and not
5 ours. They are wrinkly. You're talking about almost a mile
6 long tarp. Can you imagine laying down a mile long tarp
7 that is not going to have ridges? Again, this is over
8 graded soil.

9 THE COURT: Is there a distinction between the
10 tarp and the liner?

11 MR. ZEULI: I am using tarp as a shorthand. The
12 plastic liner is what it is called.

13 THE COURT: Are we talking a plastic liner?

14 MR. ZEULI: We are, Your Honor.

15 THE COURT: When you say tarp, you're talking
16 about the plastic liner?

17 MR. ZEULI: Correct. I am just using that as an
18 analogy, kind of shorthand.

19 As you can see, the plastic liner that both
20 parties use are not uniform. They know that and they are
21 hoping that by getting you --

22 THE COURT: I don't know what you mean by uniform.

23 MR. ZEULI: I don't either.

24 THE COURT: Do you use different kinds of plastic
25 liners?

1 MR. ZEULI: I don't know. Maybe there are
2 different thicknesses, but that is their word. They are
3 asking this Court --

4 THE COURT: No. I'm asking you. Your plastic
5 liners, your tarps, in quotation marks, are they the same
6 kind or are they a different kind?

7 MR. ZEULI: They are the same.

8 THE COURT: They are the same?

9 MR. ZEULI: Yes. Same liner.

10 So the intrinsic evidence, and if you go back to
11 your statement is there any ambiguity about a plastic liner,
12 no, there is not. Is there any reason to add the adjective
13 uniform? It actually invites ambiguity.

14 Do you need anything more on that?

15 THE COURT: No.

16 MR. ZEULI: Thank you.

17 THE COURT: Do you want to respond at all?

18 MR. BRAITHWAITE: I do, Your Honor, if you will
19 permit me.

20 THE COURT: Okay.

21 MR. BRAITHWAITE: Your Honor, the word uniform
22 seems to be the hang-up here, and perhaps the better word
23 and more descriptive is uninterrupted.

24 THE COURT: Say that again.

25 MR. BRAITHWAITE: The word uninterrupted.

1 THE COURT: Okay.

2 MR. BRAITHWAITE: Again, talking about the Cant
3 reference and what the patentee said, and what we heard from
4 counsel over here is that, oh, vacuums can go right across
5 these spray jets and these inlets. Well, that is not what
6 the patent says and that is not what the prosecution history
7 says.

8 Again, what they told the patent office is spray
9 jets and inlets on the bottom interfere with the suction
10 device of the claims. Again, on the slide is an excerpt of
11 what they told the patent office. About halfway down they
12 said whereas the spray jets located in the bottom of the
13 structure disclosed by Cant would also not allow the normal
14 functioning of a bottom cleaning device, e.g., a suctioning
15 device.

16 Also, the installation of spray jets in the bottom
17 might cause damage to the liner, for example, potentially
18 allowing the formation of cracks that could cause leakage.

19 What they said is that the liner had to be
20 uninterrupted and that anything on the bottom shooting water
21 up would interfere with the whole purpose of the patent.

22 Just a little bit of a preview, and I know we are
23 not deciding this today, but in the bottom of the accused
24 structure aren't just garden hoses. They are three-inch
25 pipes, about the size of a fire hose, that are injecting

1 water into the structure. That is what we're going to be
2 dealing with.

3 Now, sticking with the patents, since it is all
4 about the patents, so let's look at the patents and what
5 they say. Counsel brought up figure ten and let's start
6 there, and column nine. I think both are good. Counsel
7 stopped just before the context of what the piping network
8 does. At the bottom of column nine starting on line 65, the
9 patent recites the structure has a pipe network with
10 injectors that allow an efficient application of the
11 products and water homogenization, and what they are talking
12 about is potentially the application of chlorine or other
13 water maintenance products, and that allows the water to be
14 homogeneous.

15 In these large lakes, if the water does not move,
16 then it is going to stagnate. The purpose of this pipe
17 network was just to get the water to move, get things moving
18 and mix things up a little bit. It even says later, you
19 know, if you build this in a windy spot, maybe you don't
20 even need the pipe network because the wind will cause the
21 water to mix and be homogeneous.

22 The patent goes on, and I am reading from line 65,
23 in swimming pools this is irrelevant. It is saying the
24 injectors of swimming pools that mix the water, that is
25 irrelevant to this patent, just like they said the injectors

1 at the bottom of a Cant swimming pool, those were irrelevant
2 to what is being claimed. But in large volumes of water,
3 you might have stagnant zones that create contamination
4 centers, and so what the patent describes are these
5 injectors along the sides of the lagoon and that is what
6 counsel showed in figure ten. I will move back to figure
7 ten, because I think it is pretty telling.

8 Here in figure ten we see the diagram of what was
9 invented and counsel talked about the injectors labeled 40.
10 Now, those are all along the perimeter. Notice that there
11 are no injectors on the floor, on the bottom because it
12 would interfere with the cleaning of the plastic liner. It
13 would make it so that it couldn't be cleaned as claimed. So
14 this is all just water mixing stuff up on the edges, up
15 above the plastic liner, but not interrupting it, so maybe
16 the better term is uninterrupted. That is what is claimed
17 in the patent and that is what is going to be the issue down
18 the line, is there are injectors all over the place in the
19 accused product such that these claims never should have
20 been --

21 THE COURT: You suggest or at least the picture
22 suggests a periphery.

23 MR. BRAITHWAITE: Sure. They have got like you
24 might have in a backyard pond, just to keep the water moving
25 so that it does not stagnate, but it is not interrupting

1 that plastic liner, because it says you would interfere with
2 the whole purpose of the patent and all of the cleaning.
3 The idea of this patent was to get all of the gunk and the
4 crud on the bottom, and if you have anything interrupting
5 the liner, shoot it back into the water like a fire hose
6 size pipe that is shooting the gunk and crud back into the
7 water, then that is antithetical to this patent. Again,
8 perhaps the better term is this is an uninterrupted liner is
9 what they are claiming and that is what we are asking the
10 Court to construe.

11 We have looked at what Crystal Lagoons' commercial
12 embodiments are, and I hesitate to do this because the
13 Federal Circuit says it is legal error to look at the
14 commercial embodiment of the patented device in determining
15 infringement or in the claim construction process, but they
16 are not going to show you any inlets or anything else at the
17 bottom of their water structure either. But looking at the
18 commercial embodiment is legal error, and while the
19 presentation may be filled to the brim with looking at what
20 their lagoons look like, that is not the process of claim
21 construction. It is the claims and what is in the patent in
22 black and white and not in pretty pictures and amazing
23 colors, and that is what we are looking at. Again, an
24 uninterrupted liner is what is claimed and that is what we
25 are asking the Court to construe.

1 THE COURT: Why doesn't the patent as a patent say
2 that?

3 MR. BRAITHWAITE: It does. It does not use the
4 word uninterrupted.

5 THE COURT: It does not use the word, but it says
6 what it says.

7 MR. BRAITHWAITE: It also does not say a liner
8 that can be interrupted with spray jets and liners.

9 THE COURT: No, it says what it says.

10 MR. BRAITHWAITE: You're right, Your Honor, and
11 that is why this is a context specific exercise in which we
12 look at the claim, but not the claim in isolation. We are
13 also looking at the rest of the patent and the figures, for
14 example. We're looking at the prosecution history, because
15 those of skill in the art are presumed to have read the
16 whole thing --

17 THE COURT: Well --

18 MR. BRAITHWAITE: -- not just the --

19 THE COURT: Isn't the claim in reference to the
20 plastic liner plain and ordinary, suggesting the same thing
21 in your head as his head and my head?

22 MR. BRAITHWAITE: I don't think so. We're all
23 approaching this with different understandings of what it
24 means to be able to claim --

25 THE COURT: Tell me your understanding then if it

1 is different than what the claim says.

2 MR. BRAITHWAITE: It is not different than what
3 the claim says, but the understanding is that the claim says
4 that the plastic liner needs to be able to be thoroughly
5 cleaned.

6 THE COURT: That is right. That is the function.

7 MR. BRAITHWAITE: And so in our heads if there are
8 inlets and spray jets in the plastic liner, the patent and
9 the prosecution history say it can't be thoroughly cleaned
10 within the meaning of the claim, and so that is what we're
11 thinking, but over here, on the other hand, they are
12 thinking that is just fine. Put in as many inlets as you
13 want. You can thoroughly clean everything. You can have a
14 vacuum over it, even though we said that wasn't permitted,
15 but --

16 THE COURT: Well, you're talking about different
17 locations too, are you not?

18 MR. BRAITHWAITE: No. Just as in --

19 THE COURT: Jets at the bottom are different than
20 jets at the perimeter.

21 MR. BRAITHWAITE: That is true. That is true, but
22 what we're dealing with and, again, the understanding is
23 that our accused structure has jets in the bottom --

24 THE COURT: Well, that may be a distinction.

25 MR. BRAITHWAITE: -- and we are going to address

1 that down the line during infringement, but our
2 understanding is that can't be thoroughly cleaned then,
3 because it is mixing up the water from the bottom, and they
4 said that our patent does not cover that because that is
5 like Cant. We don't do that. That is not what our patent
6 covers, but their actions in this case are different. They
7 have accused this structure that they know has jets in the
8 bottom, so they're under a different impression and their
9 impression is you can thoroughly clean it, jets or no jets,
10 and what we said about Cant in convincing the patent office
11 to give us a patent does not matter and it does.

12 THE COURT: We're looking at the plain language
13 and not dealing, at this point anyway, with the prosecution
14 history. It says what it says.

15 MR. BRAITHWAITE: We're dealing with the claim
16 language, but the Phillips case, the seminal case on claim
17 construction from the Federal Circuit says that you look at
18 the claims along with the prosecution history. It is not
19 just the claim in a vacuum in isolation. You look at it
20 with the prosecution history and you look at it with the
21 specifications.

22 THE COURT: Well, they say no jets at the bottom.

23 MR. BRAITHWAITE: And if we are all in agreement,
24 great, and let's get rid of this case next month when we
25 address the motion for summary judgment on noninfringement.

1 THE COURT: Okay.

2 MR. BRAITHWAITE: Thank you.

3 THE COURT: Let me hear from counsel.

4 MR. ZEULI: Go to slide 54.

5 Your Honor, we started this conversation with
6 whether the word uniform should be added. That is what the
7 defendants came to this Court and said, Judge, you should
8 add the adjective uniform to plastic liner. I think I
9 showed the Court that uniform is not in the claim language
10 and the Court recognized that. Uniform is never mentioned
11 anywhere in the patent and I think we sort of agreed that
12 uniform is ambiguous. What does that really mean?

13 Mr. Braithwaite came back up and shifted and he
14 said, well, what it should really mean is uninterrupted.
15 Well, I don't know why we would inject uninterrupted into a
16 claim that does not use that term. Uninterrupted is not
17 found in the patent.

18 The process for claim construction is specific.
19 It is you look at the intrinsic evidence. You start with
20 the claims. Is that word found there? No, it is not. You
21 look at the specification. Is that word found there? No,
22 it is not. You look at the file history. Did the patentee
23 say, oh, we only use an uninterrupted liner? No, they did
24 not. There is no mention of the word uninterrupted
25 whatsoever.

1 If you look at the screen, this is the preferred
2 embodiment that's described in the patent. It is wrinkly.
3 The liner is wrinkly. We talked about how it has a
4 recycling system around the sides that has injectors. There
5 is nothing in here that says that it would be uninterrupted
6 or uniform. There is no ambiguity. It is what Mr.
7 Braithwaite said. He said in our heads we are thinking that
8 if we have inlets and drains in the bottom, it can't be
9 thoroughly cleaned. That is an application. That is a fact
10 issue. We'll be talking about that. Is it thoroughly
11 cleaned or isn't it because, as we talked about, you do have
12 to clean the liner that is exposed so that you get that
13 beautiful looking water, but it does not need to be uniform
14 or uninterrupted.

15 Can we bring up the Cant file history statement?

16 Mr. Braithwaite really relied heavily on the
17 statement that the patent owners -- it is the therefore
18 paragraph, if we could just blow that up for the Court,
19 Bill. Thank you.

20 Mr. Braithwaite relied heavily on this paragraph
21 from the file history. His point to you was from this the
22 patent owner unequivocally, because that is what it has to
23 be, disclaimed either a nonuniform liner, the opposite of
24 what they want, or a non-uninterrupted liner, or maybe at
25 the very minimum a liner that does not have jets, but that

1 is not what it says.

2 Remember that Cant was the opposite of what
3 Crystal Lagoons does. They take water and they blast it
4 toward the bottom and they get the sediment to rise off the
5 bottom and go to the top and they clean it. Crystal Lagoons
6 uses a vacuum that goes along the bottom. No trouble
7 whatsoever in either one of these products going over those
8 ridges, of going over these little injectors or drains. No
9 problem. The cleaning gets done and that is what we're
10 going to be talking about in a month.

11 Look at what the applicant said and think about it
12 in the context of the invention has the vacuum working its
13 way across this almost a mile long liner, right? What Cant
14 is talking about is having these water jets coming in from
15 the side. What we're talking about here is how those jets
16 would interrupt the vacuum, right? One, the jets would
17 knock the vacuum of course. The vacuum is coming down the
18 liner and it is cleaning. Why would you shoot jets of water
19 against it? And then the very sediment that the vacuum is
20 to be picking up is no longer there because the jets are
21 sending it up into the air.

22 Look at what they said. They said the present
23 invention includes a bottom covered with a plastic liner
24 that is able to be thoroughly cleaned, whereas the spray
25 jets located in the bottom of the structure disclosed by

1 Cant would not allow the normal functioning of the bottom
2 cleaning device. Didn't say uniform. Didn't say
3 non-interrupted. Didn't say it couldn't clean over the
4 little jets and irregularities that pale in comparison to
5 this liner over the ground. It just said it would not allow
6 the normal functioning of the suctioning device, the vacuum,
7 for the two reasons I mentioned. The jets are putting
8 pressure on it and moving it and the sediment is being put
9 back up toward the top where the vacuum is not.

10 Also, the installation of spray jets at the bottom
11 might cause damage to the liner, for example, potentially
12 allowing the formation of cracks that could cause leakage.
13 The fact of the matter is is that there is leakage in liners
14 all the time. The liners have leakage. That is why we're
15 going to be talking about the pipe refill system. There is
16 nothing in this statement that talks about the adjectives
17 that they want the Court to add to an otherwise plain
18 meaning.

19 Yes, we're going to have a discussion in a month
20 about whether it thoroughly cleans. That is a different
21 issue.

22 THE COURT: Yes.

23 You use vacuums?

24 MR. ZEULI: They both do.

25 THE COURT: You use a vacuum?

1 MR. ZEULI: They both do. Sure. They both use
2 vacuums.

3 Bring up the vacuum and just show the Judge real
4 quick. I think it is on slide -- I wanted to show you that
5 vacuum. We're going to talk about it a little later. I
6 don't know if I can bring it up real fast. There. Right
7 there.

8 Look at that. It looks like the Mars lander or
9 the moon rover. I mean that thing can travel over bumps and
10 crevasses. It does not have any trouble cleaning over a
11 drain or a spray nozzle, not at all.

12 So with regard to claim construction, yes, it
13 would be in error to insert any one of the adjectives that
14 they are suggesting. The language is plain.

15 THE COURT: Yes. Well, I think that there is no
16 construction necessary. I think we're dealing with a plain
17 and ordinary meaning, frankly.

18 MR. ZEULI: Yes.

19 Thank you, Your Honor.

20 THE COURT: Let's deal with your third issue.

21 MR. BRAITHWAITE: Your Honor, the next term --
22 there are two terms that are almost identical. They are the
23 freshwater feeding pipe system that allows the entrance of
24 freshwater and results in water removal by displacement of
25 the surface water through the skimmer system.

1 The other one that is close to it, but stated in
2 not structural but method form, is feeding the water body
3 with inlet water to generate the displacement of surface
4 water, ellipses, and removing displaced surface water using
5 the skimmers.

6 MR. ZEULI: Your Honor and Mr. Braithwaite, I
7 apologize for the interruption, but we think it would be
8 easier for the Court and preferable if we just stayed with
9 patent by patent and didn't mix the two. So just stay with
10 the structure patent terms and then move --

11 THE COURT: I understand. It is fine. Let's do
12 it one at a time as best we can, recognizing that we're
13 dealing with interrelated matters over a period of time and
14 integrated one with another.

15 Go ahead.

16 MR. ZEULI: That is great, Your Honor, I just --

17 THE COURT: Talk about freshwater.

18 MR. BRAITHWAITE: Okay, Your Honor.

19 There is a technology issue here, just to
20 understand what the different types of water flow systems
21 are in swimming pools. I put on the screen a slide that we
22 had in our technology tutorial that we submitted to the
23 Court. Both of these pictures are taken from a little book
24 written by a Mr. Perkins called Swimming Pools. It is the
25 fourth edition of the book printed in 2000. It talks about

1 different types of pools.

2 One is a flow through system in which you bring in
3 new water, and it could be water from a lake or a river or
4 something, or if you had enough money it could be municipal
5 water, but you bring it in to the pool and then that causes
6 the ejection of water on the other side. It is called a
7 flow through. It comes in the inlets and it goes out the
8 outlets or the skimmers. So you're continually replacing
9 the water in the structure.

10 And then the other and, you know, where we live in
11 a desert, and most people are concerned with conserving
12 water, is you have a filtration system where you use the
13 same water over and over again, but you bring it in through
14 the floor drains and through the skimmers, and then you pass
15 it through a filter to clean up the water and put that old
16 water right back into the pool. That is what we're probably
17 most familiar with, that most lay jurors would be familiar
18 with, but these other systems do exist.

19 What we're talking about in the patent is pretty
20 clearly a flow through system. The asserted claims say it.
21 The specifications say it and the prosecution history says
22 it. It specifically says that the patent is not directed to
23 a filtration system where you take the water from the
24 skimmers and pass it through a filter and put it back into
25 the pool. The specification says that is not the case. The

1 claim says that that is not the case and the prosecution
2 history of the patents says that that is not the case.

3 Starting with the words of the claims, we're
4 talking about water removal, so the first place we see
5 removal is about halfway down the claim and it says wherein
6 the structure includes a system of skimmers for the removal
7 of impurities and surface oils. So removal in a vacuum, not
8 in the context of the claims, but just in a vacuum and
9 someone says remove and it could have a number of meanings
10 in different contexts, but here it is talking about getting
11 rid of and disposing, eliminating the impurities and surface
12 oils. You don't want to recirculate impurities and surface
13 oils because that would be antithetical to keeping a clean
14 and clear pool, so they remove impurities and surface oils.

15 THE COURT: Where do the surface oils come from?

16 MR. BRAITHWAITE: Mainly from our bodies. If you
17 had a pool and no one jumped in it, it stays pretty clean.
18 But humans are dirty, and when we put on sunscreen and just
19 the natural oils of our skin and we get in the pool they
20 come off and they don't sink to the bottom. The floor drain
21 is not going to suck them up.

22 So if you were to block off the skimmers of your
23 pool you could see this sheen, you know, you get those oily,
24 rainbow slicks on the top of your pool. The skimmers take
25 off that top layer and in our normal pools they send it to

1 the filter and get rid of those oils, and then once it is
2 oil free water, you put it back in the pool.

3 Here what is claimed is a freshwater feeding pipe
4 system that allows the entrance of freshwater and results in
5 water removal by displacement of the surface water through
6 the skimmer system. We're not talking about recirculated
7 water. We're talking about removing it. It is a
8 pass-through system.

9 So we have got these multiple instances of the
10 word removal and we should understand them the same. It is
11 the same word and we interpret it consistently and it is
12 talking about injection and disposal, not recirculation.

13 We have cited the cases and the principles of
14 claim construction, that the same words are interpreted
15 consistently and different words are presumed to have
16 different meanings. So if we look at the unasserted claims,
17 they are very instructive.

18 When Crystal Lagoons brought this case, they only
19 asserted certain of the numbered claims in the patents and
20 chose not to assert others. If we look at claim five, and
21 this is one that is not asserted, and this says take all of
22 those limitations of claim one and add to it a recycling
23 system that uses pipes with injectors which allow
24 maintaining water homogeneity by avoiding stagnating zones
25 and allowing the application of chemicals.

1 These are the side injectors that we looked at in
2 figure ten that mix up the water and keep it from
3 stagnating. It is not a filter. We're going to see that.
4 They are not talking about a filtration system. They knew
5 how to say the word recycling when they wanted to, but they
6 used in claim one the word remove the water. Don't recycle
7 it. Recycle and removed are presumed to have different
8 meanings and we know they know how to say the word recycle.

9 Then in claim eight, and this is like claim one,
10 and it is kind of like claim one and claim five together
11 actually. Here you have the system of skimmers. I'm about
12 halfway down. It says a system of skimmers disposed along
13 the border for the removal of impurities and surface oils,
14 semicolon, and then next it says a recycling piping system
15 installed around the border of the structure and including a
16 plurality of water injectors distributed along the border
17 for injecting water into the water body to maintain
18 homogeneity. That is what we just saw in connection with
19 claim five.

20 Then we have the same limitation from claim one, a
21 freshwater feeding pipe system that allows the entrance of
22 freshwater and results in water removal by displacement of
23 surface water through the skimmer system. If water removal
24 meant the same thing as recycling it, then that means that
25 the recycling element is vitiated and it has no meaning at

1 all. So these mean different things. That is what we're
2 talking about is water removal.

3 Now let's move to the specification. What does
4 the patent specification and description say? Well, this
5 comes from column ten, lines 32 through 36. It says that
6 the crystalline structures or ponds must have water intakes
7 that allow using low cost water, since in contrast to
8 swimming pools that recycle water through filters, in this
9 case the water from the skimmers and suction cart or device
10 is disposed of.

11 If you have really expensive water, this system is
12 not going to work, or at least it is not going to be cost
13 effective. It depends on how much money you have, I
14 suppose. It says that you need to be using low cost water,
15 because you're going to be getting rid of it. The claims
16 claim a structure where the water is completely disposed of.
17 It is that pass through system.

18 Then in column nine, 43 through 53, the
19 specification says the structure must have skimmers to
20 remove surface oils and particles, since otherwise they
21 accumulate and deter water quality, even after performing
22 all of the chemical treatment steps, since these do not
23 remove floating greases or solids. In this way the final
24 objective of obtaining color transparency and cleanliness
25 characteristics similar to swimming pools or tropical seas

1 at low cost would not be fulfilled without these skimmers.

2 The process of moving superficial water toward the
3 skimmers caused by freshwater entry together with a
4 flocculant suction device system replaces the traditional
5 filtering system of swimming pools.

6 Again, we are not talking about recycling through
7 a traditional filtration system. We are talking about
8 getting rid of that water. Think of how it is built. If it
9 is built without a filter, and if the skimmers just took the
10 water out and put it back in, there is nothing to get rid of
11 the oil because there is no filter. So they are ejecting
12 the water and that is the structure that is being described
13 and the process that would also be described in the process
14 patent.

15 In the file history of one of the family members,
16 and the Federal Circuit says that you can even look at
17 different patents in the same family to figure out how one
18 of skill in the art would understand these terms. The
19 patent applicant said the structure also has systems to
20 harvest and constantly supply freshwater with certain
21 quality needed for the maintenance of the water at low cost.
22 This is also not a requirement of standard pools that filter
23 and recirculate water, because they do not need a constant
24 supply of freshwater with certain physiochemical parameters.
25 Again, we are not talking about filtering water. Our

1 skimmers don't go through a filter. They dump and inject
2 the water.

3 I'm going to bring up Cant again because it
4 actually came up in this context as well. The patent
5 examiner said, hey, look at Cant. It has got skimmers and
6 we're going to reject your claims. The patent applicant
7 said no, no, no. Cant is different.

8 Let's look at Cant real quick. I put it again on
9 the screen. The important point here -- the filter is
10 identified as item 54 over there on the left. That is a
11 filter. The skimmer is up there at 56. The water flows
12 through that skimmer and comes down and moves along the
13 bottom pipe and gets reinjected into the pool.

14 Here is what the patent applicant said during
15 prosecution. In response to the examiner saying, hey, Cant
16 discloses skimmers, the patent applicant said specifically
17 Cant in its entirety is silent with respect to the
18 freshwater feeding pipe system of claim one.

19 In contrast, Cant merely describes a filtration
20 system in which pool water is forced through one or more
21 filters, filter 54 or filter 72, to remove debris from the
22 pool water. The filtration system of Cant neither discloses
23 nor suggests, quote, a freshwater feeding pipe system that
24 allows the entrance of freshwater and results in water
25 removal by displacement of surface water through the skimmer

1 system.

2 So this picture of the skimmers going through a
3 filter is entirely silent with respect to water removal, but
4 that is not what they're claiming here and that is why we
5 need claim construction is to say if water removal means
6 what it says, removing, then we are good, but if the
7 interpretation is recycling, then that is a whole other
8 thing and the patent specifically disclaims that and the
9 prosecution history disclaims that and that is not found in
10 the claims of the patent either.

11 The other filter here I will just note, was
12 described as numeral 72, and that is kind of on the bottom,
13 and what is happening is there is a floor drain there at 62
14 that is pulling in water from the floor and passing it
15 through the filter and then it is coming out of those inlets
16 on the bottom, 47.

17 There was a little bit of a misstatement before I
18 think about Cant and the vacuums and everything. What Cant
19 shows there on the side, the inlets right at the bottom, on
20 the wall but at the bottom, and they are pushing water in so
21 that the water gets mixed up. Well, that is the
22 interruption of the plastic liner. That whole system of
23 bringing water in at that low level interferes with the
24 cleaning as well and that is, again, what we're dealing with
25 in this case.

1 A preview down the line here and what the Court is
2 going to see is what is highlighted here on the left, these
3 wall injectors on the side, just like in Cant, interrupting
4 the concrete on the wall, because the wall is not actually
5 covered in a plastic liner, but interrupting the whole thing
6 so it mixes up the water and does not allow things to be
7 thoroughly clean. At every instance this patent says not
8 like a pool, not like filters and not like anything else,
9 and we are bringing in water and what that is doing is
10 causing the dumpage of the extra water, displacement.

11 What we have in the brief, and I don't know if it
12 is still an issue, is what does displacement mean? Is that
13 an equivalent amount or is it something lesser? I guess
14 this is the construction of another word, but I think
15 displace literally means to take the place of, and so it is
16 like anything else that if you put a gallon of water in,
17 then you are displacing a gallon of water and a gallon of
18 water gets dumped through those skimmers. That is what
19 we're asking the Court to construe that removal means
20 removal, not non-removal or recycling.

21 THE COURT: You say that is what the claim says?

22 MR. BRAITHWAITE: Yes.

23 THE COURT: Okay. You agree with that?

24 MR. BRAITHWAITE: I completely agree that removal
25 means removal.

1 THE COURT: Okay.

2 MR. ZEULI: Let me just clarify something for the
3 Court before I launch into why removal is a different word
4 than elimination. I think I just heard counsel say removal
5 means removal. That is the claim term that is in dispute
6 here and I don't think we need to have construction.
7 Removal is the word in the claim. The briefing was that the
8 defendant wanted to change the word removal to the word
9 elimination, but unless I'm misunderstanding, Judge, I think
10 he just agreed that they agree that the claim does not need
11 to be construed because removal is the word that was in
12 dispute. Sure we can have a discussion in a month about
13 what gets removed and how much gets removed out of the
14 accused structure, but I think for claim construction, if I
15 heard it right, I don't think there is any construction
16 needed here.

17 THE COURT: I don't think so either.

18 MR. ZEULI: Thank you.

19 THE COURT: Your next one?

20 MR. BRAITHWAITE: Your Honor, the next one is
21 pumping system, but it really goes hand in hand with the
22 suction device. They are not really evaluated in isolation
23 and should be brought together.

24 Is that okay with the Court if I address both,
25 pumping system and suction device?

1 THE COURT: Yes. You go ahead.

2 MR. ZEULI: Your Honor, if I could just interrupt
3 again. We are okay with that as long as we stay on the 514,
4 the structure patent, and we are not getting into the other
5 two patents yet.

6 THE COURT: Okay. You go ahead.

7 MR. BRAITHWAITE: All right. Let's start with
8 movable suction device. It is kind of a generic term and it
9 does not say vacuum, but the alternative construction
10 proposed by Crystal Lagoons is just an ordinary
11 run-of-the-mill pool vacuum. That is not what these patents
12 describe in the claims and it is not what they describe in
13 the specification and it is not what is described in the
14 prosecution history. Again, the entire context of the
15 patent is that this is not talking about pool vacuums.

16 Instead, it is talking about a suction device that
17 operates as a complete replacement for a filtration system.
18 The patentee gave special definition to the term suction
19 device and specifically contrasted it with a vacuum. At
20 column nine, lines 1 through 16, the patentee said this.
21 They are essentially giving the definition of a suction
22 device.

23 It is important to keep in mind that the objective
24 of the suction device is not only the cleaning of the bottom
25 of the described process, as is the case of vacuum devices

1 of traditional pools, but that said suction device replaces
2 completely the traditional filtering system of swimming
3 pools together with the use of flocculants.

4 Furthermore, the fact that the process
5 contemplates the displacement and removal of superficial
6 water with impurities towards the structure slots
7 complements the action of the suction device. In other
8 words, the suction device not only removes material
9 naturally deposited on the bottom, leaves, branches, earth,
10 et cetera, but also the suspended particles that are
11 eliminated by filtration in the case of swimming pools and
12 are converted into floccules or large particles and are
13 suctioned by the device in this invention, thus decreasing
14 their removal cost by an order of magnitude.

15 That idea that this was a complete replacement for
16 traditional filtration was so important that they restated
17 the whole thing twice. Again, at column 12, 3 through 9,
18 the patent applicant says the identical thing. It is
19 important to keep in mind that the objective of the suction
20 device or suction cart is not only the cleaning of the
21 bottom in the described process, as is the case of a vacuum
22 in swimming pools, but that the suction device replaces
23 completely the traditional filtering system of swimming
24 pools together with the use of flocculants and the skimmer
25 system. So where, as here, the patentee has clearly defined

1 a claim term, that definition is usually dispositive. That
2 comes from the Jack Guttman case we cited in the briefs.

3 But, more importantly, this is an instance in
4 which these claims don't say the words traditional
5 filtration, but they do through the term suction device,
6 because suction device as defined is a complete replacement
7 of traditional filtration.

8 This is where the Virnetx case from the Federal
9 Circuit comes into play. In that case the literal language
10 of the claims was to a secure communication link. It just
11 used the word secure. It didn't say anything about
12 anonymity. What the patentee was saying is our claims don't
13 require anonymity. That word does not appear in the claims.
14 The defendant was saying, yeah, but your whole patent is
15 directed to anonymity in connection with security. The
16 entire purpose of the whole thing is anonymity.

17 So the Federal Circuit said secure, that term
18 secure as used in that asserted patent, means both data
19 security and anonymity. It incorporates that concept,
20 because it was so front and center of the patent under
21 examination, and so the court construed secure to require
22 both data security and anonymity.

23 It said the fact that the summary of the invention
24 gives primacy to both these attributes strongly indicates
25 that the invention requires more than just simple data

1 security. That is on page 1318 of that Virnetx case.

2 THE COURT: What is your point?

3 MR. BRAITHWAITE: Well, the point here is that,
4 again, the interpretation of suction device can't just mean
5 the mere pool vacuum. One of skill in the art wouldn't
6 think, oh, that is an everyday pool vacuum when reading
7 these claims. What they would understand, based on the
8 entire context, is that suction device means that that is
9 the way the claim structure is cleaned. It is not cleaned
10 through filtration, because the suction device completely
11 replaces a filtration system. That is what the patent
12 applicant said over and over and over again ad nauseam in
13 the specifications of the prosecution history.

14 THE COURT: So what?

15 MR. BRAITHWAITE: Well, it matters because what
16 Cloward H2O designed was a traditionally filtered pool.

17 THE COURT: I'm sorry?

18 MR. BRAITHWAITE: They designed a traditionally
19 filtered pool. They have a whole host of skimmers and
20 inlets and outlets that send water to huge filters, two big
21 filter houses on the side of this lagoon that is accused by
22 Cloward H2O, and they filter the entire volume of this
23 two-acre lagoon twice each day. They don't rely on simple
24 pool vacuums as a replacement for filtration.

25 So the suction device that is claimed is not just

1 the little robotic pool vacuum, everyday pool vacuums that
2 have been in use for 30 some odd years. That can't possibly
3 be the suction device, because what the patent claimed was a
4 suction device that completely replaces traditional
5 filtration.

6 THE COURT: That is fine. It says what it says.

7 MR. BRAITHWAITE: It does, but Crystal Lagoons is
8 going to come up here and --

9 THE COURT: Well, let's wait and let them assert
10 whatever they assert.

11 MR. BRAITHWAITE: Let's see what they assert.

12 THE COURT: Okay.

13 MR. BRAITHWAITE: Thank you, Your Honor.

14 THE COURT: I might indicate here that when we
15 break today, we'll break at a quarter to 12:00 and we'll
16 reassemble about 1:30.

17 MR. ZEULI: That should work perfectly, Your
18 Honor, because we're on the last two terms of the 514
19 structural patent, which Mr. Braithwaite has covered
20 together and I will do the same as well.

21 What I was going to say is it is so fascinating --
22 it is so fascinating, and I think that is why I love the job
23 that I have because I get to talk to people like you about
24 language, and I just remember going back to the hearing, and
25 I don't know when we had it but, you know, you said

1 something about, you know, is there ambiguity in this
2 document? We'll look at the entire document. The entire
3 document that we're talking about is the 514 patent and it
4 is the structure.

5 I talked at the beginning about how important it
6 was that this invention was a liner over soil, not a
7 concrete traditional pool, and then you had to have three
8 structural elements that allowed that liner over soil to
9 provide that crystal clear water, and they were the skimmer
10 system, the pumping system and the vacuum. We're going to
11 talk about the pumping system and the vacuum.

12 Let's look at what the claim language says,
13 because there is really no ambiguity in the words. I think
14 Your Honor keeps saying that they say what they mean and I
15 think that is exactly right.

16 Thank you, Bill. Actually, Bill, could you bring
17 up claim one?

18 Let's look at it together. Here are the terms
19 that we're talking about now. We're talking about these
20 last lines at the end, a pumping system, including a
21 coupling means connected to a removable suction device for
22 cleaning the plastic liner.

23 I mean where is the ambiguity? Do we not think a
24 jury will be able to assess our evidence as to their pumping
25 system and their vacuum? I already showed you their vacuum.

1 It is that cool moon lander thing. I think it is pretty
2 cool and the jury is going to look at that and they are
3 going to say it is a suction device.

4 Bill, go back to the presentation.

5 What they are suggesting is they want you to add
6 49 new words. We are not talking about something super
7 technical that a layperson or a lay judge has never
8 encountered. This is not a X.M.L. load file from who knows
9 what. It is a pump. We have them all over our houses. It
10 is a vacuum. We have them. They want to add 49 new words
11 to have the Court say things such as, and let me use my
12 cursor here if I can, that it is going to remove not only
13 the settled debris, and that is the soot on the bottom of
14 the liner, right, and you have to remove that and we agree
15 with that.

16 Suspended solids? No, that is not what the vacuum
17 pumping system removes. Those would be suspended. It is
18 suction. It sucks things off the bottom. So even the 49
19 words that they have come up with is wrong. It would defeat
20 the very invention that this gentleman created and now has
21 over 70 working lagoons around the world.

22 One of the things that Mr. Braithwaite said is
23 water is expensive. Water is expensive. They have a
24 100-acre lagoon in Sharm el Sheikh, Egypt. Where there was
25 desert, there is a 100-acre Crystal Lagoons because this

1 technology works and it is water efficient. It is very
2 water efficient. All you have to do is keep the liner clean
3 so when the sun comes in the water looks good. Why do we
4 need 49 words to be added to this? It makes no sense at
5 all. Those words are not found in the claims. They are not
6 found.

7 The reference in the patent that Mr. Braithwaite
8 talked about, yes, it mentions one embodiment where the
9 water is disposed of, but that is not the only thing it
10 mentions. I will show the Court where it talks about
11 recycling far more times. I believe the disposal of the
12 water and the quote Mr. Braithwaite showed you, and I will
13 bring it up, they use that once and then right below it they
14 talk about recycling the water, because if you have got 100
15 acres in the Egyptian desert you are not throwing out the
16 water. There is no way. It makes no sense. The invention
17 wouldn't even work. You remember the skimmers I talked
18 about and that struck and you have to have that. If you
19 throw out the water, that water level would go below those
20 skimmers and it wouldn't go anywhere. It wouldn't even
21 work. Why would you do this?

22 Here is what it would look like. This sort of
23 points out the error here of the defendant's proposal. They
24 would take from claim one, pumping system, and if Your Honor
25 looks on the screen, and look how it would look with 49

1 different words in there. Does that make any sense? I
2 don't think so.

3 It also introduces a step. I keep mentioning to
4 the Court let's keep these patents separate because they are
5 separate. One covers the structure for holding the water
6 and the structure that keeps it looking the way Crystal
7 Lagoons looks. The other two we're going to talk about
8 after lunch, they go to the process for doing that and they
9 are separate. You could have the structure and you could
10 use different processes for cleaning that water and for
11 treating that water and you might use what they invented and
12 you might use something different, but that does not have
13 anything to do with the structure. The structure is the
14 structure. It has a pump and a vacuum. It is not that
15 hard.

16 When we talk about the methods, they could be used
17 with different things too. They don't have to be used with
18 that structure. They are separate and independent. Here
19 they are trying to mix the two, because it talks about
20 removing the water. That is not what it requires.

21 I want to go to the vacuum for a moment.

22 Can we get to the removal suction device? I will
23 talk about that briefly.

24 This goes back, you know, and this is sort of
25 treaded ground, and you may recall that you ruled -- you

1 denied their earlier summary judgment and this was this
2 issue. They came before the Court and they wanted in this
3 patent, the 514 patent, they wanted you to insert all of
4 those words. We did this already. The Court said no, I'm
5 not going to do that. That is process. There is nothing in
6 the claims that requires that the disposal of the water not
7 be with tradition filtration, nothing at all.

8 Bill, could you bring up column 10, please. First
9 I want to go to lines 32 to 36.

10 I think the Court is familiar with that there can
11 be different embodiments in a patent. Now, this is the
12 language that Mr. Braithwaite talked about and basically
13 this is what they are hanging their hat on. They are saying
14 that here in the patent the inventor said, you know, we
15 dispose of the water. Sure. Sometimes they do, but not
16 always.

17 Let's leave this, Bill, and if you can maybe up in
18 the top, let's blow up for the Judge lines 56 through 61.
19 Could you just highlight recycling system?

20 In that same paragraph, in that very same
21 paragraph of the patent the inventor, Mr. Fishman, is
22 describing that there is structure that recycles, and we
23 have talked about that earlier and we saw that in figure 10,
24 the recycling system. Sure, sometimes you might dispose of
25 the water, but you don't always have to.

1 If you think about it, why would you? Water is
2 expensive. It makes no sense that you would have this
3 enormous, multi-acre piece of structure and you would dump
4 the water out. The claim makes no requirement for that. It
5 just requires a pump and a suction device to clean the
6 plastic liner. That is all. They have a pump and a suction
7 device and so do we. We'll talk about those next month but,
8 you know, when you go back to the claim construction, what
9 is the context where somehow we should inject 49 new words
10 for a pump and a vacuum. It just makes no sense. It just
11 makes no sense at all. It is not found in the claims. The
12 patent office didn't require it. In the specification
13 itself, yes, sometimes they do dispose of the water but not
14 always.

15 They also talk about recycling. In fact, disposal
16 of water is only mentioned one time in the patent, Your
17 Honor, one time, and Mr. Braithwaite found it. Of course it
18 is in there and that is one option. Seven times it mentions
19 recycling, because if you think about it, you're not
20 throwing out the water. It just does not make any sense and
21 there is nothing in this claim that would cause it to be
22 ambiguous, and that would require you to put in 49 different
23 words, 49 new words.

24 Essentially, again, this is where the Court ruled
25 last time when we were here at summary judgment the first

1 time. They wanted you to add these words and the Court
2 correctly said that that is a process step and it is not
3 structure and we're talking about structure, and there isn't
4 anything in the claim or the patent or file history that
5 says that you have got to use this -- and what do they say
6 here -- the disposal of water with mixed debris. We have
7 already covered this ground and you rejected it then and I
8 would suggest it should be rejected now.

9 THE COURT: Thank you.

10 Any response, counsel?

11 MR. BRAITHWAITE: Yes, please.

12 Your Honor, we are not injecting words into the
13 claim and the argument that this is just an exercise to
14 inject words is not really an argument. We're trying to
15 figure out what is claimed. What is the scope of what the
16 patentee invented? There are a couple of issues here, and
17 on the one hand Crystal Lagoons has marched into this court
18 saying it is just so simple. We just have some plastic
19 liner and a skimmer and a vacuum and that's what our patent
20 covers.

21 Well, that is every pool ever. That is the
22 problem with this case. They have come into this court
23 saying we have a patent on a swimming pool. Cloward and his
24 company have been building swimming pools plus enormous
25 recreational water features since the nineties with plastic

1 liners, skimmers and injectors.

2 That is not what they claimed. When we get down
3 into the claim, it is a claim to a swimming pool. It is a
4 claim to their particular process. It is not just a simple
5 vacuum. It is not a traditional pool filtration system and
6 it is not just simple skimmers that recycle the water,
7 because they said it wasn't that.

8 One of the words in which they encapsulated this
9 whole idea that this is not a traditional swimming pool and
10 it is not traditional cleaning methods is the word suction
11 device. Counsel got up here and said suction device does
12 not clean suspended particles. Well, tell the author of the
13 patent that, because that is exactly what the patent says.
14 Where?

15 We read previously from the section paragraph and
16 it explicitly states that that is the very purpose of the
17 suction device is to clean up suspended particles. It says,
18 in other words, the suction device not only removes material
19 naturally deposited on the bottom, leaves, branches, earth,
20 et cetera, but also the suspended particles that are
21 eliminated by filtration in the case of swimming pools, and
22 that are converted into floccules and suctioned by the
23 device in this invention, the one of the 514 patent.

24 With respect to what happens with the water of the
25 suction device, well, if they don't have a filter and they

1 are not filtering the water and they are not relying on
2 filtering, then they have got to dispose of it, because
3 there is nothing to get the suspended particles out.

4 So what is described in the patent is the
5 elimination of the water. They use the word remove in the
6 claims and that is what they do. They remove it. They
7 don't recycle it. It says the crystalline structures or
8 ponds must have, not may have, not in some embodiments have,
9 must always have water intakes that allow using low cost
10 water, since in contrast to swimming pools that recycle
11 through the filters, in this case the water from the skimmer
12 and the suction cart or device is disposed of. In this case
13 and in this patent what we're talking about in the claims of
14 the 514, it is disposed of and that is what the patent says.

15 Now, the argument is to move beyond the patent, to
16 go to Egypt, and there is nothing said about Egypt in this
17 patent. They do talk about something in Chile. In Chile
18 the embodiment pulls water from the ocean and brings it into
19 the lagoon and they clean it up and then it is ejected back
20 out to the ocean through the skimmers. It passes through.

21 Now, in Egypt maybe water is in short supply and
22 they can't do that. Well, that just means that Egypt is not
23 covered by this patent. That is why the Federal Circuit has
24 said it is error for a court to compare in its infringement
25 analysis the accused product or process with the patentee's

1 commercial embodiment. That comes from the Zenith Labs,
2 Inc. case versus Bristol-Meyers Squibb, 19 F3d 1418, pincite
3 1423. It is a 1994 case.

4 But even in this last year, 2020, the Federal
5 Circuit said in Myco Industries, Inc. vs. Blephex,
6 B-l-e-p-h-e-x, at 995 F3d 1, pincite 15, and this is in
7 2020, the law is clear, however, that, quote, infringement
8 is determined on the basis of the claims, not on the basis
9 of comparison with the patentee's commercial embodiment of
10 the claimed invention. Similarly, claim construction from
11 which an infringement analysis depends focuses on the
12 recited limitations, not the features of the commercial
13 embodiment.

14 THE COURT: What difference does it make if they
15 use a process for recycling the water after the claim
16 process has been used to dispose of the water? Think about
17 that.

18 I'm going to break right now because of another
19 commitment. 1:30 and we'll keep going.

20 MR. BRAITHWAITE: Thank you, Your Honor.

21 THE COURT: We'll be in recess.

22 (Recess)

23 THE COURT: Good afternoon.

24 It looks like we're all here. We had fun during
25 the noon hour. There was a ceremonial occasion that

1 occurred naming this courthouse for Senator Orrin Hatch,
2 which was conducted very nicely, and most of us attended by
3 Zoom, but it was worth attending.

4 At any rate, I have looked at the matters we were
5 discussing prelunch and I am of the opinion that there is no
6 need for construction of the provisions that we were talking
7 about. I think they are clear and they are simple enough
8 and they are understandable.

9 Let's move on to the next one.

10 MR. BRAITHWAITE: Your Honor, if you will permit
11 me, you asked me a question right before we broke, and I
12 think it was along the lines of so what and why are we
13 talking about this traditional filtration thing and I have a
14 response.

15 THE COURT: I'm happy to have you respond.

16 MR. BRAITHWAITE: It has to do with how justice is
17 achieved in the patent system and with a patent case. What
18 we had here and the background of this case is Crystal
19 Lagoons bid a project down at the Hard Rock Casino in
20 Florida. They put forth their proposal about how to build a
21 lagoon with the flocculation and their suction device and
22 everything they talked about in their patent. The property
23 owner didn't want to go along with that so they reached out
24 to Cloward at Cloward H2O and said can you do this. Cloward
25 said I can do it like a swimming pool. I can put in a

1 filtration system so that it is a filtered thing. I don't
2 want to do nor am I going to do what Crystal Lagoons does.
3 So Crystal Lagoons lost the project and Cloward was the
4 designer on the project.

5 I think this case bubbles out of that, one company
6 selected over the other. What we had in the initial
7 complaint -- this is almost two years ago -- paragraph 67
8 from that complaint says on information and belief the Hard
9 Rock lagoon was previously designed as a conventional
10 swimming pool with a swimming pool filtration system and a
11 large number of inlets and outlets to filter the entire
12 volume of water and, therefore, would not infringe Crystal
13 Lagoons' patents.

14 However, from what has been observed at the site,
15 there would not be a traditional filtration system, since
16 there is a small number of inlets and outlets that would not
17 allow filtering the entire volume of water, as well as not
18 having the proper amount of filtration for this purpose.

19 The small number, and those are kind of vague
20 terms in and of themselves, but what Crystal Lagoons was
21 referring to is shown in 71. They talk about initial
22 drawings. Again, when it is like a conventional swimming
23 pool, it had 80 inlets located on the lagoon's bottom and
24 walls, which are not present in the currently built lagoon
25 at the Hard Rock Hollywood project.

1 This initially brought to mind, hey, you guys are
2 wrong. There are two big filter houses that filter this
3 entire thing more than twice a day. There are over 100
4 inlets and outlets in this system, way more than the 80 you
5 thought was sufficient. So we brought an early summary
6 judgment motion because of their admission. Their patents
7 are not directed to this traditional filtration. That was
8 the earlier summary judgment motion in this case. We
9 provided prediscovery our construction plans for the lagoon
10 showing the hundreds of inlets. It is not like these are
11 hidden. You can go down to Florida and put your foot in the
12 water and touch them and figure out where the inlets are and
13 you can count them up. If you did your pre-suit
14 investigation, you should have counted up 130 some inlets,
15 but it didn't happen.

16 What we got during that hearing was a request to
17 this Court to kick the can down the road to claim
18 construction. In the transcript of that hearing Mr. Zeuli
19 says they are trying to confuse the Court early before there
20 is discovery that a patent related to the structures of
21 these lagoons has something to do with filtration. It
22 doesn't. If they want to make that argument when we are
23 doing claim construction, we can have a fully briefed, you
24 know, issue on why that is not the case, but it shouldn't
25 come this way raised for the first time in their reply

1 brief.

2 It was let's kick that issue down the road until
3 today. So here we are at claim construction when Mr. Zeuli
4 said the time would be appropriate, and now the request
5 again let's kick the can down the road.

6 THE COURT: Well, it may be appropriate to kick it
7 down the road in reference to the existence and operation of
8 a filtration system. It is either an auxiliary system or a
9 concurrent system or an afterthought system, but we're
10 concerned with the patent claims.

11 MR. BRAITHWAITE: Exactly, Your Honor.

12 THE COURT: The patent claims.

13 MR. BRAITHWAITE: I am not here asking the Court
14 today to determine whether or not the Hard Rock lagoon has a
15 filtration system or not. That is for another day. We
16 don't think there is any dispute because there is a massive
17 filter house and anyone with eyes can see it, but not for
18 today.

19 The question today is what is the scope of these
20 claims? Do they cover structures with the traditional
21 filtration system? The claims say they don't. The
22 specification -- we put up on the screen all of the places
23 where they say our system of skimmers that eject water, and
24 our system with the suction device replaces the traditional
25 filtration system, so inherent in these claims is we are not

1 talking about traditional filtration.

2 So we're asking the Court what is the scope of the
3 claims? Does the scope cover traditionally filtered pools?
4 We can have the question later about whether the Hard Rock
5 meets that.

6 THE COURT: They have disclaimed any interest, as
7 far as I can determine, in the so-called traditional
8 swimming pool filtration system, but we're dealing with a
9 question of what activity is permissible activity after the
10 so-called contaminated water is extracted from the pond, the
11 lake, whatever you want to call it, and the manner in which
12 that is subsequently used. That is not involved in this
13 lawsuit.

14 As far as I can determine, nobody has asserted at
15 this point that they claim an interest. They disclaim an
16 interest as far as their system is concerned in the
17 traditional swimming pool filtration system. They say,
18 look, flocculants, freshwater, disposal, displace, and if
19 there is some proficient or some suggestion that they are
20 indeed using a traditional filter system, then one would
21 have to ask to what extent does that in some fashion assist
22 in our determination as to the scope of the claims?

23 MR. BRAITHWAITE: But, Your Honor, it is the scope
24 of the claims that says that the system, the claimed system,
25 the affirmatively claimed system has a suction device which

1 completely replaces --

2 THE COURT: It says what it says.

3 MR. BRAITHWAITE: Right.

4 THE COURT: It has a device and that is what it
5 says.

6 MR. BRAITHWAITE: But the device and the meaning
7 of that suction device is the complete replacement of a
8 traditional replacement system, and where we have a
9 difference of --

10 THE COURT: Assuming that -- assuming that it says
11 what it says and does what you claim it does and is involved
12 as far as the limits go, the fact that they may have an
13 adjacent system of some kind is an interesting question. It
14 is an interesting question. They do or they don't, and that
15 may have some bearing on the outcome of what we're dealing
16 with.

17 MR. BRAITHWAITE: But what we are not addressing
18 today is what they do. That is what the Federal Circuit --

19 THE COURT: I understand that. I understand that.
20 We are doing what is known as the impossible. We are
21 dealing with matters as hypotheticals almost, which is a
22 rather strange way of thinking about a problem, but at this
23 point the question becomes is the language the kind of
24 language that in some fashion requires, because of ambiguity
25 or vagueness or lack of specificity, some kind of a rational

1 construction. I think it says what it says. I don't think
2 it requires construction at this point.

3 MR. BRAITHWAITE: Your Honor, if I might refer to
4 the 02 Micro International case from the Federal Circuit in
5 2008, they dealt with this problem that we have here. They
6 said a determination that a claim term, quote, needs no
7 construction, end quote, or has the, quote, plain and
8 ordinary meaning, end quote, may be inadequate when a term
9 has more than one ordinary meaning.

10 THE COURT: Well, that is right. It is an
11 ambiguous term and you have got to tell me what the
12 ambiguity is and you have yet to do that.

13 MR. BRAITHWAITE: Your Honor, the ambiguity is
14 each party is saying that these terms are ambiguous.

15 THE COURT: No, they don't.

16 MR. BRAITHWAITE: They are coming at the terms
17 with different interpretations and different understandings.

18 THE COURT: No. It says what it says.

19 You tell me your view of why it is ambiguous.
20 That is the whole process.

21 MR. BRAITHWAITE: The ambiguity seems to be coming
22 because what these claims state is they don't cover a
23 traditionally filtered body of water.

24 THE COURT: Do they?

25 MR. BRAITHWAITE: No, they don't.

1 THE COURT: Then what are we talking about?

2 MR. BRAITHWAITE: What we have here is a lawsuit
3 that is premised on these claims actually covering a
4 traditionally filtered body of water.

5 THE COURT: How do we know that?

6 MR. BRAITHWAITE: Because Crystal Lagoons brought
7 the lawsuit.

8 THE COURT: So what?

9 They are saying, hey, our system is this. You're
10 suggesting that they have got an auxillary system, a
11 tagalong system as I understand your argument.

12 MR. BRAITHWAITE: Okay. I think I understand now,
13 Your Honor. I am sorry.

14 So the system down at the Hard Rock lagoon does
15 not do what they claim and what the patent describes.

16 THE COURT: It may not. That is their proof
17 problem.

18 MR. BRAITHWAITE: That is and that is what we'll
19 be addressing in October, but this is a predicate to that
20 question. Down at the Hard Rock lagoon it is not an
21 auxillary system. It is the whole system.

22 THE COURT: Well, it may well be. If it is the
23 whole system, they have got problems.

24 MR. BRAITHWAITE: Thank you, Your Honor. That may
25 have just answered my question.

1 The only point I guess to answer your question so
2 why does it matter is that the case has gone on for almost
3 two years, and while the Patent Act allows a patent
4 defendant that has been unreasonably accused of patent
5 infringement such as Cloward H2O to collect their attorneys'
6 fees and everything else at the end of the day, the end of
7 the day has to come sometime. And the persistent request to
8 kick it down the --

9 THE COURT: That is right. As soon as we pretry
10 this matter, we'll set it for trial.

11 MR. BRAITHWAITE: Okay. I will move on, Your
12 Honor. Thank you.

13 THE COURT: I'm sure that you and I and others
14 have been concerned with the virus and that the virus has
15 been an interplaying partner in everything that we do.

16 You're one of the few times I have had people show
17 up in court. I do that deliberately because of the nature
18 of the case.

19 MR. BRAITHWAITE: Thank you, Your Honor. We
20 appreciate that and thank you for indulging me for a moment.
21 It is a pleasure to be back here in this courtroom with you.

22 Moving on to the next term, portion of water, this
23 implicates an entirely different patent and patent family.

24 THE COURT: Yes.

25 MR. BRAITHWAITE: So the 514 patent and the 822

1 patent are part of the same family that was filed back in
2 the year 2006. This 520 patent from which the phrase
3 portion of water comes is something entirely separate. It
4 was based on an application filed in 2012, so some six odd
5 years later. I have put a portion of claim one up here on
6 the screen that uses this phrase a portion of water. It
7 talks about the portion of water -- that someone needs to go
8 and identify a portion of water intended for recreational
9 purposes within the water body.

10 Now, I think the ambiguity --

11 MR. ZEULI: Mr. Braithwaite, I apologize for
12 interrupting and, Judge, I apologize for interrupting. Our
13 position is that portion of water does not need to be
14 construed. However, if the Court wanted to construe it, we
15 don't have an objection to the defendant's portion of the
16 entire water body, so we could move on to the other claim.
17 Portion of water does not need construction, but for the
18 sake of moving this along --

19 THE COURT: Are we talking a cup?

20 MR. ZEULI: What is that?

21 THE COURT: Are we talking a cup? What kind of a
22 portion are you talking about?

23 MR. BRAITHWAITE: Your Honor --

24 THE COURT: I thought it was all recreation.

25 MR. BRAITHWAITE: I completely agree. The vagary

1 that we're trying to resolve is what we understand portion
2 to mean as a part, not the whole thing, and what we
3 understand Cloward's interpretation of portion is is the
4 whole thing.

5 THE COURT: Well, no. He just indicated that he
6 agreed with you.

7 MR. BRAITHWAITE: Then I think we are fine.

8 THE COURT: Okay. No need to worry about it.

9 Ultimately somebody is going to have to define it
10 for the Court on a factual basis in contrast to a claim
11 basis.

12 MR. BRAITHWAITE: Thank you, Your Honor.

13 THE COURT: I am interested in the term recreation
14 as well. People seem to focus in on swimming. Are we
15 talking kayaks or are we talking surfboards? What are we
16 talking about? Somebody is going to have to say the whole
17 thing is a recreational activity. Then we get into the
18 interesting question as to which portion do you measure
19 chemically and what portion do you measure for temperature?

20 MR. BRAITHWAITE: Correct, Your Honor.

21 Recreation has not been one of our terms, but I
22 think the patent describes recreation as everything from
23 swimming to kayaking to all sorts of recreation.

24 THE COURT: Walking on water.

25 MR. BRAITHWAITE: That, too, I suppose.

1 I am not sure we have a construction issue on
2 that, but there is going to be a dispute, a factual dispute
3 about -- I think Crystal Lagoons focuses on swimming not
4 being allowed in certain portions. You know, I think it
5 raises an interesting question with respect to the next term
6 which is delimiting zone. I don't know if Your Honor has
7 been up to the Jewish Community Center up by the University
8 of Utah, but this is a picture of a pool where I take --

9 THE COURT: I had been there before it was ever
10 the community center as a matter of fact.

11 MR. BRAITHWAITE: This is a portion of their pool.

12 THE COURT: Prior to the time that Izzy Wagner
13 bought it and dedicated it.

14 MR. BRAITHWAITE: Well, it is still in active use
15 today and this is where my daughter swims.

16 There are portions of this pool that are dedicated
17 to different recreational purposes. There is this broad,
18 sweeping, zero entry zone where kids can splash around and
19 play without having to worry about the deep end. There is
20 the shallow end of the pool where swimmers can generally
21 swim and then there are the diving boards.

22 One time my daughter went to cross the buoy line
23 and go towards the diving boards and the lifeguard was no,
24 no, no. You don't swim. People are going to jump on your
25 head. There is no swimming under the diving boards, but it

1 is still a recreative end of the pool. That is kind of what
2 we're dealing with here. We have swimming zones and
3 kayaking zones and everything else.

4 One of the terms here is delimiting zone, because
5 what the 520 patent talks about is a portion of water that
6 is treated to sanitary compliance and that portion of water
7 has three different zones in it. It describes them using
8 these terms sanitary compliant zone, delimiting zone, and
9 most and favorable zone. They are all part of the portion.

10 So what I have put on the screen is kind of a
11 description of that and what is described. You have the
12 sanitary compliant zone, which might be roped off and it
13 might not be roped off. It does not really matter.

14 Then you have the delimiting zone, which is the
15 edge, and then there is the rest of the lake out there.
16 Then there is this idea of the most and favorable zone.
17 What is being described is these chemical dispensers at
18 three, the little triangles, spitting out chlorine or some
19 other chemical cleaner, and so it cleans this portion of
20 water. At this furthest point, the edge of your sanitary
21 compliant zone, that is where your water quality is probably
22 going to be the worst because it is the furthest from your
23 chemical dispenser.

24 So the question that is inherent in the delimited
25 zone is delimited from what? Both parties agree on the

1 general construction that a delimiting zone is a virtual
2 zone that delimits the sanitary compliant zone and does not
3 require a physical barrier, but the construction has
4 inherent in it what Cloward has proposed for construction,
5 that it is delimitating it from the non-sanitary compliant
6 zone, the rest of the water, the place that is not treated.
7 That is what the dispute centers around.

8 We continue on with the vagary of delimiting zone
9 with the unanswered question, delimited from what, if we
10 just go along with Crystal Lagoons' construction. That is
11 why we have proposed the additional language to describe
12 what is delimited, which is inherent in the term, and it is
13 the rest, the non-sanitary compliance area. There is not
14 much more to say about it than that, because that is the
15 entire purpose of the 520 patent.

16 With that I will turn my time to Mr. Zeuli.

17 MR. ZEULI: Bill, could you go to slide 93,
18 please.

19 Sometimes claim construction is hard and you have
20 to look at all of the intrinsic evidence and sometimes
21 extrinsic evidence if there is ambiguity, but only if there
22 is ambiguity. The one time claim construction is not hard
23 is when the inventor acts as his own lexicographer, a fancy
24 word for providing a definition in the patent.

25 THE COURT: You have done that with one of your

1 terms, if I remember correctly.

2 MR. ZEULI: That is correct. That is the one that
3 we are on, the delimiting zone. It is the only one that the
4 defendants have asked this Court to construe where the
5 inventor --

6 THE COURT: Tell me again how you define it.

7 MR. ZEULI: I will read it right out of the
8 patent. As used herein, the delimiting zone corresponds to
9 a virtual zone --

10 THE COURT: A zone is a zone.

11 MR. ZEULI: -- that delimits the sanitary
12 compliant zone and does not require a physical barrier.

13 THE COURT: Okay. Tell me what you really do.

14 MR. ZEULI: Sure. I will talk about that, but I
15 do want to mention one other thing before I leave this.

16 When there is a definition provided by the
17 inventor that --

18 THE COURT: You're stuck with it.

19 MR. ZEULI: That is right. For better or for
20 worse you're stuck with it. Here the defendant has come to
21 say, look, you should reject the definition that the
22 inventor wrote in his patent, and ignore the law on being
23 his own lexicographer, and add that there is delimitation
24 between this chemically treated area and a non-treated area.
25 There is no non-treated area. Lagoons are treated. We'll

1 talk someday about recreational --

2 THE COURT: The whole thing?

3 MR. ZEULI: The whole thing.

4 THE COURT: The whole thing is chemically treated?

5 MR. ZEULI: That is correct. The whole thing is
6 chemically treated.

7 Can you bring up figures one and two?

8 What Mr. Fishman came up with, though, is when
9 you're chemically treating a swimming pool in your backyard,
10 it does not require all that much chemistry. It is not that
11 big in context to the structures we're talking about here,
12 and so it is reasonable to have it be homogeneous.

13 THE COURT: Well, you don't have zones if you
14 treat everything then.

15 MR. ZEULI: That is right. That is one of the
16 principles of how traditional filtration and traditional,
17 conventional swimming pools work is they don't have
18 stagnation zones. It is homogeneous is the word that we
19 typically talk about.

20 THE COURT: Well, why worry about zones if you
21 don't have any?

22 MR. ZEULI: Because in these gigantic structures
23 you're going to have an area, and the swimming area would be
24 one example, that is going to be required to meet stricter
25 standards of --

1 THE COURT: But you're meeting the standards
2 through the whole thing.

3 MR. ZEULI: No.

4 THE COURT: You are not?

5 MR. ZEULI: You are not.

6 You are treating throughout the whole thing, but
7 you do not have to meet the standards throughout the whole
8 thing. So what Mr. Fishman realized is he said, aha -- if
9 you could blow up figure two please, Bill. Okay.

10 I don't have to spend all that money on all that
11 chemistry for treating this entire lagoon if I only have
12 swimming in a particular area. I can comply and spend a lot
13 less money, if you look on the screen, by treating one zone
14 with that chemistry. That is pretty clever. He defined it
15 as such. I mean --

16 THE COURT: How do you define the area so that
17 people are aware of it?

18 MR. ZEULI: People don't need to be aware of it.
19 They don't need to know.

20 THE COURT: You can swim anywhere?

21 MR. ZEULI: No, you can't swim anywhere. Some
22 places --

23 THE COURT: How do you tell them not to swim
24 anywhere?

25 MR. ZEULI: So the way that it works at Cloward's

1 lagoon is -- let's bring it up -- let me just find the
2 slide. They have got a sign that says don't swim in the
3 lagoon.

4 It is slide 17, please.

5 Bill, if you could just bring up the lower right
6 quadrant and just zoom in on that for the Judge.

7 That is the sign at Cloward's lagoon.

8 THE COURT: What is the sign that you use?

9 MR. ZEULI: What is that?

10 THE COURT: What is the sign that you use to
11 effect your claim?

12 MR. ZEULI: Actually this isn't in the claim.
13 This isn't in the claim and I don't know exactly what signs
14 they use. It depends on which lagoon you're probably at.
15 The point is that this invention very cleverly deals with
16 the situation where you have a massive structure but only a
17 portion needs to be chemically treated at a certain level.
18 It all needs to be treated, but only a portion needs to meet
19 the stricter guidelines and that is what it does and it does
20 it quite well. The inventor defined it. I mean I have
21 never -- yeah, I can't imagine not accepting the inventor's
22 definition.

23 THE COURT: The definition is there and the law is
24 what it is.

25 MR. ZEULI: Yes.

1 THE COURT: You can be your own lexicographer, but
2 when you provide the definition, you're stuck with it.

3 MR. ZEULI: That is exactly right, for better or
4 for worse. Here it is for better and we take it and we
5 shouldn't mess with it.

6 THE COURT: How does it help us at all in the long
7 run?

8 MR. ZEULI: Well, it helps us because what we'll
9 be able to show the Court and the jury is that this is how
10 Cloward addresses its lagoon as well. There is an area that
11 has a higher chemistry.

12 THE COURT: So what?

13 MR. ZEULI: Well, so it infringes that claim.

14 THE COURT: So what?

15 MR. ZEULI: So it infringes the claim.

16 THE COURT: What is wrong with putting up a sign?

17 MR. ZEULI: There is nothing wrong. That actually
18 proves our point and that is the evidence we'll be bringing
19 to you when we show you the factual disputes about whether
20 Cloward treats their lagoon so-called homogeneously or
21 whether there are areas where there are lots more nozzles
22 that put lots more chemistry in there. It infringes.

23 THE COURT: What suggests by way of a legal
24 proposition anywhere that one is required to do anything
25 like that?

1 MR. ZEULI: I don't understand your question, Your
2 Honor.

3 THE COURT: Why have divisions? Why have areas?
4 Why be virtual?

5 MR. ZEULI: Cost. Because of the cost.

6 Well, let me take them in order. Why have areas?
7 Because it would be cost prohibitive or considerably more
8 expensive to treat a two, four, 20 or 100-acre lagoon with
9 the chemistry that is required for a swimming area. The
10 swimming area might only be, Your Honor --

11 THE COURT: Well, why can't everybody do something
12 like that in taking care of the swimming area and provide
13 chemicals? What is so unique about that?

14 MR. ZEULI: What is so unique is it had never been
15 done. Pool technology had always been homogeneous. You
16 treat the whole structure the same. When you expand your
17 thinking into these much, much larger structures, that
18 becomes very cost prohibitive if you have to treat all four
19 million gallons of water.

20 THE COURT: I can't understand the motivation.

21 MR. ZEULI: The patent office looked at it and
22 said, yeah, that is patentable. We're going to give you a
23 patent on that.

24 THE COURT: Well, I would be interested in some
25 law on that and we'll get to that down the road.

1 MR. ZEULI: Yes.

2 My only point here is -- I mean it is a pretty
3 neat solution to a problem that was created by having these
4 much larger structures. The patent office thought so and
5 gave them a patent and he defined the term in there.

6 THE COURT: You're stuck with it.

7 MR. ZEULI: Yes.

8 THE COURT: I can understand that.

9 MR. ZEULI: Okay. Thank you, Your Honor.

10 THE COURT: Anything else, counselor?

11 MR. BRAITHWAITE: I think there are a couple of
12 brief points.

13 I completely agree that the patentee has acted as
14 their own lexicographer, but the question that is left
15 ambiguous, even though the patentee has put a definition in
16 there, what is left ambiguous is delimited from what? What
17 we heard was the shuffling of language. I went back and I
18 found the answer to the question what is recreation, because
19 the claims say a portion of water for recreational purposes.

20 In the 520 patent, and I am here at column two,
21 and the paragraph beginning on line 16, on the second line
22 of that it ends with large water bodies are used for a wide
23 variety of recreational purposes that include bathing,
24 waterskiing, windsurfing, boating and many other activities.
25 So there we know what is meant by recreation.

1 What you had was a focus on swimming, a subset.
2 Like, oh, well, this part of the lagoon is for swimming, and
3 then the rest of the lagoon is for kayaking and boating and
4 other stuff.

5 Well, then there is no portion, no part that is
6 delimited for sanitary compliance and recreation because the
7 whole thing is, and that is what we heard is the whole
8 thing. So the question that is going to come down the line
9 is both on infringement and invalidity of this patent.

10 THE COURT: Well, the question of validity is an
11 entirely different question.

12 MR. BRAITHWAITE: It is, but claim construction is
13 a part of that. We construe the claims and we understand
14 what is meant by the claims, and then if something after the
15 patent date does what is said by the claims it infringes,
16 but if there is something before the patent was filed, then
17 it invalidates the patent. You still need to understand the
18 scope of the claims.

19 THE COURT: Well, that is a different question.
20 That is different from the meaning of the claim itself.

21 MR. BRAITHWAITE: Yes, it is, but it answers the
22 Court's question about how is this going to help us down the
23 line, because what is described in the patent as the prior
24 art is the treatment of an entire large body of water,
25 mixing it all up, the whole thing. They say that is prior

1 art. That is not what we are doing.

2 I have here again the 520 patent talking about the
3 state of the art. This is in column four, lines 28 through
4 43. It is talking about the prior art and what has been
5 done before. It talks about this U.S. patent number ending
6 in 268 that discloses a method and apparatus for treatment
7 of large water bodies by direct circulation.

8 About halfway down it states that the 268 patent
9 does not mention nor disclose a method for treating a
10 portion of water within a large water body in order to
11 comply with specific micro bacteriological sanitary
12 conditions, but only discloses a method for maintaining
13 circulation within a large water body.

14 The method from the 268 patent does not apply
15 chemicals through diffuser means in order to create a
16 sanitary complaint zone, but maintains circulation within
17 the water body that would disperse chemicals throughout the
18 water body, not allowing the creation of a sanitary
19 compliant zone.

20 So if you are treating the whole thing, you can't
21 even create this zone. So treatment of everything so that
22 it can be used for recreation would fundamentally destroy
23 the idea of these zones and the potential for any
24 infringement argument.

25 What I brought up here at the Jewish Community

1 Center I think is illustrative. There are the creation of
2 zones all over the place, but this pool treats the entire
3 water body, it treats the play area, the zero entry, it
4 treats the shallow end and it treats the deep end where
5 there is no swimming. It treats everything. So there is no
6 sanitary compliant zone. The whole thing is. That is what
7 pools have been doing forever.

8 The principle, and you remember we talked about
9 humans being dirty and they get in the water, and the
10 principle is where you have more people per unit of water,
11 the more you need to clean it. So hot tubs where you have
12 got people in close quarters sitting together, that is a
13 pretty dirty place, and so you have to circulate that water
14 and clean it a lot quicker to deal with the number of
15 people.

16 In the shallow end you have a lot more kids
17 playing and splashing around and more people are comfortable
18 in the shallow end even if they can't swim, so there is a
19 higher concentration of bodies. So there is more
20 circulation in the shallow end than there is in the deep end
21 where you don't have a ton of people.

22 Then in a huge lake you're not filling that lake
23 to the brim with people. There are only a couple of people
24 paddling around out there so you need even less circulation
25 equipment.

1 It has been a principle of water treatment
2 forever. The Florida Pool Code that predates these patents
3 significantly talks about, hey, if you have one of those
4 zero entry areas where kids are going to be splashing, you
5 need to double your inlets. There is going to be more
6 people, more dirty people so you have to double your
7 circulation equipment in those areas. The Texas code says
8 the same thing.

9 I look again at the Cant patent and let's take a
10 look at this and see what is happening. You have these
11 evenly spaced inlets from the shallow end down to the deep
12 end, but in the shallow end there is less water so there are
13 more inlets per unit volume of water in the shallow end, as
14 there should be, than in the deep end.

15 The question we're going to get down the line is
16 we're going to be looking at the Hard Rock lagoon and we're
17 going to be saying, okay, does this only treat this little
18 pocket of water where people swim or does it treat the
19 entire thing?

20 In the future, and I understand that this is not a
21 thing for today, but here is a picture of the inlets of this
22 lagoon. There are 115 in total. They are all over the
23 place. Like on the south end here, I have outlined in blue
24 a building and this is the south end filter house. This is
25 where everything from the skimmers of the little swimming

1 bay pocket up on the top and the whole south end of the lake
2 all go back to this filter house. It all gets pushed
3 through the same filters. It all gets pushed through a
4 system that applies the same chlorine and the same chemicals
5 and then it shoots it back out to the entire south end of
6 the lake.

7 At the north end of the lake, shown on the right,
8 it is the same thing. There is no swimming bay up there,
9 but everything from the north end gets shoved off to the
10 north end mechanical house to be filtered and chemically
11 treated and then shot back into the lake.

12 So we're going to be addressing this question of
13 where are the zones? What is the zone? We need some sort
14 of certainty about is a delimiting zone a buoy line that
15 says don't swim under the diving board, because if it is,
16 they are going to have massive invalidity problems. If it
17 means delimiting zone based upon where you're treating water
18 and where you are not, then that is going to help us with
19 the infringement question next month.

20 That is all I had on that term in rebuttal. If
21 the Court does not have questions, I can move on to I think
22 our last sets of terms.

23 THE COURT: You recognize that if you want to play
24 your own lexicographer, you may?

25 MR. BRAITHWAITE: Yes.

1 THE COURT: Okay. Thank you.

2 MR. BRAITHWAITE: I think the last set of terms
3 for the parties are the determining terms.

4 THE COURT: Is that a judgment call or is that a
5 matter of measurement?

6 MR. BRAITHWAITE: Your Honor, I think it is a
7 matter of measurement based on what is stated in the patents
8 themselves.

9 THE COURT: If it is a matter of measurement, then
10 what is there to construe?

11 MR. BRAITHWAITE: Well, because we apparently have
12 different understandings of the term. It is ambiguous to
13 these parties and we need a decision one way or the other to
14 say, Cloward H2O, you're right or you are wrong, so we know
15 which definition we're operating under as we approach these
16 future questions.

17 THE COURT: But you recognize it is a matter of
18 measurement. It is either saline or it is not.

19 MR. BRAITHWAITE: Well, I don't think both parties
20 are --

21 THE COURT: It is either 98 degrees or it is not.

22 MR. BRAITHWAITE: Correct, Your Honor, but I don't
23 think both parties are operating under the common belief
24 that it is measurement.

25 THE COURT: Well, we'll find out. We'll ask.

1 MR. BRAITHWAITE: Okay. Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. ZEULI: When this building was built there was
4 an engineer that designed -- by the way, congratulations. I
5 met Senator Hatch many years ago. He is a fine man and this
6 building is honorably named after him.

7 When this building was designed and before it was
8 named after Senator Hatch, an engineer sat down and
9 determined what the HVAC system should be, and he or she did
10 that because you don't build a building and then go in and
11 stick a probe at the end of the air conditioning duct and
12 say, whoops, we got it wrong.

13 The word in the patent claim is determining. It
14 is not measure. It is not test. The inventor certainly
15 knew and understood empirical measurements like testing and
16 measuring and spoke about it in his patent, but the word
17 that he chose in the claim is determining. It is a common
18 English word.

19 THE COURT: How do you determine?

20 MR. ZEULI: How do you determine? You can
21 determine a number of different ways.

22 THE COURT: Well, don't you measure in order to
23 determine?

24 MR. ZEULI: That might be one way.

25 THE COURT: Are you measuring two things?

1 MR. ZEULI: Webster's dictionary says determining
2 is to find out or come to a decision about by investigation,
3 reasoning or calculation.

4 THE COURT: Sure. It is a judgment call
5 supposedly.

6 MR. ZEULI: Not necessarily.

7 THE COURT: Well, based on what?

8 MR. ZEULI: Based on scientific principles,
9 information that can be discerned before you build the
10 building.

11 THE COURT: Sure. Sure. But here we're talking
12 about what people do in the way of taking temperature.

13 MR. ZEULI: No, we are not.

14 THE COURT: Well, you are making a value judgment
15 in not using the scientific means of determining with
16 exactitude the temperature. You made a healthy guess rather
17 than an instrumental measurement.

18 MR. ZEULI: Just like in this room it was
19 determined by an engineer what the range of the temperatures
20 would be. We didn't have to build it and then measure it
21 and determine that we got it right or wrong.

22 Now, of course, you would and have a
23 thermometer --

24 THE COURT: Don't you take the temperature?

25 MR. ZEULI: Of course.

1 THE COURT: And don't you measure the saline
2 content?

3 MR. ZEULI: Yes, but that is not the only way you
4 determine. This goes right --

5 THE COURT: Tell me how else you determine.

6 MR. ZEULI: An engineer often determines using
7 scientific principles like looking up in a handbook as to
8 what the salinity of the water in a certain area is by using
9 mathematical calculations. When you build a building of a
10 certain size, for example, what is the amount of airflow
11 that is required? What do you have to have by way of a
12 blower and whatnot?

13 Our point, Your Honor, is that they are trying to
14 get you to narrow a common English word, determine, to just
15 testing and --

16 THE COURT: What are the elements of determine?
17 You suggest that determine is --

18 MR. ZEULI: Investigate --

19 THE COURT: -- unambiguous.

20 MR. ZEULI: No.

21 THE COURT: That it is specific, but it is simple,
22 as I understand your argument.

23 MR. ZEULI: I think that is right. I think most
24 people have experience in determining things, and I think
25 that while it can include, and the patent specifically talks

1 about empirical ways, testing and calculation, it is not
2 limited to that.

3 THE COURT: What function does it serve in this
4 particular instance? In relationship to the claim as a
5 claim, what function does the determination serve?

6 MR. ZEULI: You don't want to build a 40-acre
7 structure to the tune of tens of millions of dollars and
8 find out that you determined incorrectly the amount of
9 saline or the temperature range. That is designed ahead of
10 time to the structure so that when it is built, you can test
11 and confirm that it is correct.

12 THE COURT: I understand that. You test.

13 MR. ZEULI: You can test to confirm.

14 THE COURT: And you anticipate in your design a
15 particular result.

16 MR. ZEULI: Correct.

17 THE COURT: But so what?

18 MR. ZEULI: That is determining. Determination --

19 THE COURT: At what point in time does
20 determination take place? Is it in the design?

21 MR. ZEULI: Yes, in the design and in the testing
22 after the design is built.

23 THE COURT: It requires testing?

24 MR. ZEULI: It does not require testing. It
25 requires determining.

1 THE COURT: Well, tell me when the determination
2 takes place.

3 MR. ZEULI: It can occur before when the design is
4 being created.

5 THE COURT: Now, tell me the nature of the
6 determination that occurs in the design.

7 MR. ZEULI: If you look on the screen, Your Honor,
8 and this is from the patent and it says, for example, with
9 regard to salinity the dilution power may be previously
10 known. That is known from either handbooks or calculations
11 based on the soil.

12 THE COURT: Well, you're talking about the manner
13 in which you would diminish the salinity if that is your
14 goal.

15 MR. ZEULI: I wouldn't agree with that, Your
16 Honor. Here what the defendant is asking you to do is to
17 take a word, determining, which is clearly broad enough to
18 encompass more than just testing and measuring, and chop it
19 down and say you can only infringe if you test and measure.
20 They are trying to get rid of the prebuild, the design, the
21 determining before when you're designing the construction.

22 THE COURT: Well, you anticipate that your design
23 is going to create a particular level of salinity and you
24 determine that with the use of particular chemicals.

25 MR. ZEULI: I would disagree with that, Your

1 Honor. I would say that you don't anticipate, you design.
2 It is scientific. It is --

3 THE COURT: Well, we can talk about scientific.
4 Tell me the process. Tell me specifically what mental
5 processes are involved in determination.

6 MR. ZEULI: Sure. If I go back to the
7 definition -- investigation. So let's just take salinity.
8 You can investigate the soil. You can do that obviously
9 with the salinity of the water.

10 THE COURT: Sure.

11 MR. ZEULI: You can investigate before the
12 structure is built the salinity of the water by the soil, by
13 books that have publications, certain cities have
14 publications of what the salinity is of their water. So
15 those are examples of determining that do not require you,
16 the designer, to test or measure.

17 Now, afterwards, of course Your Honor is right
18 that it could include testing and measuring to see if you
19 got it right. You used the word anticipate. I don't think
20 that is right. I think it is determine. It is an
21 engineer's job and they put a lot of time and a lot of math
22 and a lot of work into it and they come up with a system
23 that they expect based on investigation and reasoning and
24 calculation. That does not require or is not limited to
25 just testing and measuring, which sounds like after the

1 fact.

2 THE COURT: Well, how do you verify your
3 determination call, your judgment call? How do you verify
4 that?

5 MR. ZEULI: Well, you can verify it either through
6 written records as to what the specifications --

7 THE COURT: No. How do you verify it? Once you
8 have designed and once you have put things in place, how do
9 you verify?

10 MR. ZEULI: Put a thermostat on the wall.

11 THE COURT: Sure you do.

12 MR. ZEULI: Sure. That is included. Absolutely,
13 that is included in determining, but it is not limited to
14 that.

15 THE COURT: Well, I am trying to figure out and
16 have you identify for me what is in addition to the testing.
17 You say, well, the design, the design. So what? You check
18 out your design by testing, by using the appropriate
19 measuring sticks to measure either the temperature or the
20 chemical content to make sure that people are not harmed,
21 that people are going to be safe. Maybe your design is
22 faulty. Maybe your anticipated action is inappropriate. If
23 we want to distinguish between the thought processes before
24 the testing, then we ought to distinguish that, and when we
25 talk about judgment or talk about determination, we ought to

1 focus in on time and place and what.

2 MR. ZEULI: I agree with you.

3 Let me show you what the patent says. Let's go
4 back to the intrinsic record. On the screen is a snippet
5 from the patent that talks about this. You can see that
6 this has to do with salinity, and what I have underlined at
7 the top with regard to determining says may be previously
8 known. That is a temporal statement. May be previously
9 known.

10 Now, contrast that with the next words, or
11 empirically determined, may be previously known or
12 empirically determined. So when determined is modified by
13 the adjective or adverb empirically, yes, you can stick a
14 probe in it later and find out if you determined correctly
15 before you built the structure, when you designed the
16 structure. That is what this is talking about because, you
17 know, it would be backwards to design this building or one
18 of these massive lagoons and not determine beforehand what
19 the salinity requirements are going to be.

20 Yes, you should test it later to make sure that
21 people are safe and that you have determined it correctly,
22 because you may determine it incorrectly, but it does not
23 change the fact that prior to building the structure, in the
24 design phase you are determining, because the definition of
25 determining includes investigation, reasoning or

1 calculation.

2 THE COURT: Where does it say that in the patent?

3 MR. ZEULI: It does not use those exact words, but
4 I would say it is included in this statement that I show on
5 the screen where it says may be previously known. How can
6 something be previously known? Investigation, calculation
7 and --

8 THE COURT: They watch it on television.

9 MR. ZEULI: Perhaps. Your Honor, perhaps. Bob
10 the Builder show.

11 THE COURT: Why is this important at all?

12 MR. ZEULI: It is not, because what they are
13 trying to get you to do is narrow the term so that Cloward,
14 that is a designer, can argue that, hey, we don't stick a
15 probe in the water.

16 Now, the fact of the matter is, as we'll show you
17 some day or we'll show the jury, Cloward does stick probes
18 in the water and they do test and they do calculate, but
19 they also determine. This is a common English word. They
20 are asking you, based on nothing from the patent, and they
21 can't show you where in the claim the word test or
22 calculation is. It just says determine. They can't show
23 you in the patent where it says when we say determine, we
24 only mean testing and calculating, because they know that
25 they have got this statement that is on the screen to deal

1 with. The patent office surely didn't require it. There is
2 no ambiguity here. There is no ambiguity with regard to
3 determine.

4 There is a dispute factually as to whether they
5 determine, but there is no dispute with regard to the
6 ambiguity of the term determining.

7 Here is one of the methods, one of the best --

8 THE COURT: Then what are we talking about?

9 MR. ZEULI: You would have to ask them. They want
10 to create a noninfringement defense where there is none.
11 You know it is so interesting, why determining? Why
12 wouldn't they pick the word minimum? Why wouldn't they pick
13 the word period? They picked determining, a common English
14 word, because if they can get you to narrow it to something
15 that they will claim they don't do, testing and calculation,
16 then they can bring an argument for noninfringement, but
17 that would be wrong.

18 One of the other pieces of intrinsic evidence,
19 Your Honor, that is so important is claim 13 in the patent,
20 and it is on the screen. It specifically is limited to the
21 empirical methods. That is not the claim we're talking
22 about. The inventor has the broader claim, number one that
23 we're talking about that uses the word determine, and then
24 he wrote a narrower claim that says determined by empirical
25 methods. We don't assert that claim. We are not asserting

1 that claim.

2 THE COURT: Have you withdrawn that claim?

3 MR. ZEULI: No.

4 Actually, I may have misspoken. I think they
5 do --

6 MR. BRAITHWAITE: No, we don't assert that.

7 MR. ZEULI: There are so many claims.

8 Right. We have not asserted that claim in this
9 case, because this one is narrower and it is limited I would
10 say to testing and calculation, the empirical methods. This
11 is very strong evidence that the broader claim determining
12 means what it says, determining, not just testing or
13 calculation.

14 THE COURT: Claim one --

15 MR. ZEULI: Yes.

16 THE COURT: -- is testing.

17 MR. ZEULI: No, determining.

18 THE COURT: No. Look at claim 13.

19 MR. ZEULI: Uh-huh.

20 THE COURT: The method of claim one wherein the
21 O.R.P. and the salinity and the temperature of the water are
22 determined by empirical methods.

23 Claim one talks about determination, does it not?

24 MR. ZEULI: Yes, but it --

25 THE COURT: And this explains the method for

1 determining.

2 MR. ZEULI: No, Your Honor.

3 THE COURT: It says what it says.

4 MR. ZEULI: Yes, it does, Your Honor, but remember
5 that this claim is not asserted. This claim is --

6 THE COURT: Well, it is part of the history of
7 this thing.

8 MR. ZEULI: No.

9 THE COURT: It is part of what is there.

10 MR. ZEULI: No, Your Honor. It is not. It is
11 evidence of our position being correct and the defendant's
12 position being wrong.

13 THE COURT: You're not asserting that they take
14 temperature?

15 MR. ZEULI: We are not asserting this claim.

16 THE COURT: You are not asserting it. In your
17 complaint you are not asserting that they take temperature?

18 MR. ZEULI: Yes, we are.

19 THE COURT: You are asserting that they take
20 temperature?

21 MR. ZEULI: Yes, they take temperature.

22 THE COURT: Does that include the claim in number
23 13?

24 MR. ZEULI: It possibly could.

25 THE COURT: Sure it could. Sure it could.

1 MR. ZEULI: But the point is, Your Honor, that
2 this narrower claim 13 is evidence that claim number one,
3 which does not limit determining to empirical methods, is
4 broader. Because if you said in claim one determining means
5 testing and calculation only and those are the empirical
6 methods, claim one and 13 would be the same. That would be
7 wrong.

8 THE COURT: It says the method of claim one -- the
9 method of claim one.

10 MR. ZEULI: I understand, Your Honor, but the way
11 that the claim structure works --

12 THE COURT: One of the methods of claim one is
13 different than the method of claim one.

14 MR. ZEULI: No. It does not work that way. It
15 does not work that way.

16 THE COURT: It does not mean --

17 MR. ZEULI: Pardon?

18 THE COURT: "The" does not mean "the"? It means
19 everything.

20 MR. ZEULI: It does mean -- let me try it this
21 way. Let me try it this way.

22 Claim one claims a car that has tires, a steering
23 wheel and windshield wipers. Claim 13 says that the car of
24 claim one, wherein the steering wheel is blue. That is
25 strong evidence that claim number one is not limited to a

1 blue car steering wheel.

2 THE COURT: Let's have counsel respond.

3 MR. ZEULI: Okay.

4 MR. BRAITHWAITE: Thank you, Your Honor.

5 To preface this I think I want to go back to the
6 question the Court asked. So what? Why is any of this
7 going to matter?

8 Here is why it does. Cloward H2O is a collection
9 of a handful of engineers down in Provo, Utah. They sit I
10 think on the second or third floor of a small building down
11 there up against the mountains. They are not in Florida
12 dumping chlorine into a pool. They are not in Florida
13 taking the measurements of a pool. They are architects and
14 engineers that design structures and come home. They are
15 not a pool maintenance company.

16 What we have in the claims of the 520 patent is as
17 it is titled at the top of the claim one, a method for
18 controlling microbiological properties of a portion of water
19 within a water body. It is not a method for designing and
20 coming up with calculations for form and design. This is
21 talking about actually dipping your sticks into the water,
22 looking at what color they are and whatever measurements
23 you're taking and dumping chlorine in, and that is
24 subsection C of claim one, and it says dispensing an
25 effective amount of chemical agent into the identified

1 portion of water, and that is not done in design. We're
2 talking about active maintenance on the ground.

3 So Cloward H2O is sitting here saying why am I
4 accused of patent infringement for a method patent of
5 treating water? We don't do water treatment. We design
6 these structures. The goal was to design something that
7 worked similar to a typical swimming pool that would
8 operate.

9 The background of swimming pools -- I think a
10 little bit of technology here is potentially useful. What
11 you do with a swimming pool is there is a concept called
12 O.R.P. and it stands for oxidation reduction potential, but
13 in more layman's terms it is the cleaning power of water.
14 So in general, and once you get down into the super
15 scientific level, it is not always true, but in general the
16 more chlorine, the more cleaning power of water and the
17 higher the O.R.P. would be.

18 Sometimes it depends. It depends on the pH of the
19 water. That can affect the cleaning power of the water and
20 the O.R.P. Typical pool maintenance relies on keeping an
21 O.R.P. level at 650 or above. It depends on the pool and it
22 depends on the location, but you keep a pretty high O.R.P.
23 and you keep it 24-7. It is always maintained. That is why
24 you have lifeguards out there at the swimming pool dipping
25 their sticks in the water to make sure that the water is

1 still sanitary.

2 The 520 patent was about something different. In
3 the claims it talks about figuring out how low you can go.
4 What is the minimum O.R.P. level that we can maintain and
5 still be sanitary? What is the minimum amount of time that
6 we need to treat the water and still be sanitary? That is
7 what subsection B of claim one goes to. It says maintaining
8 at least a minimum O.R.P. level in the portion of water for
9 at least a minimum period of time, wherein the minimum
10 O.R.P. level and the minimum period of time cannot be lower
11 than the values calculated by, and then it gives your
12 determination step. It is talking about calculation.

13 In subset B-1 it says determine the salinity of
14 the water at the most unfavorable zone. Actually go do it.
15 Put a salinity meter in the water. What is the salinity?
16 Then use that value to determine the minimum O.R.P. It says
17 in subsection little ii, Romanette ii, determining the
18 minimum O.R.P. value based upon the salinity of the water,
19 the thing you determine, and for salinities of water between
20 zero and 1.5 percent use a minimum O.R.P. of 550. For
21 salinities of water between 1.5 and 2.5, plug your salinity
22 value into this equation and that is going to help you
23 figure out the minimum period of time.

24 For salinities higher than 2.5, the minimum O.R.P.
25 is 500, but that is always below the typical O.R.P. level of

1 a regular swimming pool that is maintained 24-7. A typical
2 swimming pool is 650 all the time. They are saying, well,
3 if the water is salty, then you can get away with less
4 cleaning power of the water, get away with a lower O.R.P.,
5 but you have to do these determination steps to figure out
6 what that is.

7 Then the next step is to figure out how long to
8 maintain that low level of cleaning power. So you determine
9 the temperature of the water, not in general, in the most
10 unfavorable zone. Someone needs to go out and do it. They
11 need to figure out what is the worst part of the water and
12 what is the temperature in the worst part of the water, and
13 then determine the minimum period of time based upon that
14 temperature using, again, a set of recited equations. For
15 temperatures between five Celsius and 35 Celsius, there is
16 one equation, and for temperatures between 35 Celsius and 45
17 Celsius, there is another equation. So you have to actually
18 do this stuff.

19 Now, the reality is that in designing a typical
20 pool or in designing the Hard Rock Hotel lagoon, you don't
21 care about the temperature and salinity, because you're
22 going to maintain that high O.R.P. of 650 or above
23 permanently, 24-7, and you always want to maintain it
24 everywhere that high. So you're not worried about taking
25 the temperature.

1 If it is a cold pool, 60 degrees, high O.R.P. It
2 does not matter. Who cares about the temperature. If it is
3 a really warm pool, 95 degrees. It does not matter, high
4 O.R.P. all the time. Temperature does not come into it in
5 the design or in the actual maintenance, which is what is
6 claimed here.

7 The same is true with salinity. If there happens
8 to be more salt in the water coming from the well, maintain
9 the high O.R.P. Maintain it all the time. If it is low
10 salinity coming from the well, high O.R.P. all the time and
11 nobody cares about the salinity.

12 What the accusation has been and the reason that
13 this case is being brought against a few engineers in Provo,
14 Utah, that aren't touching the water anymore, is they want
15 to say, well, someone could go and determine the
16 temperature. It is possible to figure it out. If it is 70
17 degrees outside for multiple days, then the water is going
18 to be near that. The salinity you just generally know and
19 no one has to really do anything.

20 If we take the patent and we say, well,
21 determination just requires that you could figure it out,
22 that you could look it up in a book, then everything
23 collapses down to treating the water with chlorine in a 2012
24 patent. That is ridiculous and no person of skill in the
25 art would approach this patent and think, well, Crystal

1 Lagoons got a patent on treating water with chlorine. That
2 is not a reasonable interpretation of these claims.

3 We have asked the Court to not just say what the
4 word determining means, but, instead, we're asking the Court
5 about the full phrase determining the salinity of the water
6 at the most unfavorable zone. What is within the scope of
7 that is just the water having salinity good enough or does
8 someone actually have to do something? The claims make it
9 clear that they do, because they have got to take their
10 value and plug it into an equation to figure out how long to
11 treat the lagoon.

12 There is another portion of the specification that
13 also draws this out and it is similar to the slide that
14 counsel for Crystal Lagoons showed the Court.

15 THE COURT: Why is it ambiguous?

16 MR. BRAITHWAITE: It is ambiguous because of how
17 it is being asserted. It is ambiguous because of how it is
18 being asserted. You have counsel for Crystal Lagoons come
19 up here and say, well, it does not mean that you have to do
20 anything. It could just be known in the esoteric and
21 ethereal sense. It is just known. That is not what
22 determining means.

23 Let's look at the specification. This is from
24 column 15, lines 22 through 33, and it specifically talks
25 about how salinity and temperature can be determined. This

1 is almost like the patentee being their own lexicographer.

2 It says the salinity can be determined by
3 empirical or analytical methods such as a visual test,
4 salinometers, I think is how you say that, that are based on
5 the conductivity of the electricity in the water,
6 hydrometers that are based on the specific gravity of the
7 water, or refractometers that are based on the index of
8 refraction of the water. Apart from determining by
9 empirical or analytical methods, it then says apart from
10 being determined they might be publicly known or can be
11 information from other sources.

12 So if you're getting it from some public knowledge
13 or information from other sources, but you're not
14 determining by empirical or analytical methods, then you're
15 not doing the determination. Just being known the spec says
16 is not determination.

17 The same thing is true with temperature. That
18 same setup is there. The temperature of the water can be
19 determined by empirical or analytical methods such as visual
20 tests, thermometers, thermocouples, resistance temperature
21 detectors, pyrometers or infrared devices or may be publicly
22 known. So apart from being determined it could also be
23 publicly known. That is not part of determination. That is
24 just being known in some ethereal sense.

25 That is what we're asking the Court to resolve is

1 do these terms about determining the minimum O.R.P. values
2 actually require what they say or is it just some
3 theoretical exercise in the ether, because if it is some
4 theoretical exercise in the ether, then, great, we know how
5 we can invalidate the claims with the simple chlorination of
6 water which has been going on forever.

7 If these steps actually have to be performed and
8 they actually have to be performed by Cloward H2O, then
9 there is zero evidence of that happening, because they are
10 designers and architects and not water maintenance providers
11 and we can deal with that issue on summary judgment.

12 THE COURT: Tell me why the claim is not clear in
13 your mind.

14 MR. BRAITHWAITE: Your Honor, the reason we have
15 asked for claim construction and it is not clear is because
16 of the strange way that Crystal Lagoons is asserting it. We
17 have people sitting on chairs in Provo, Utah that are being
18 accused of maintaining water on the Seminole Reservation in
19 Florida by supposedly performing this determining step. It
20 seems unclear, because whatever understanding they are
21 operating under is so odd and esoteric that it cannot be
22 possible. So it is unclear what their understanding is.

23 As for the claim itself and what reasonable people
24 would think, the claim is clear as day. You have got to
25 perform those steps. You have got to do those equations and

1 if you don't, you don't infringe.

2 THE COURT: Okay. Well, we'll let counsel
3 respond.

4 MR. ZEULI: I think what we have here, Your Honor,
5 is a factual dispute. You asked Mr. Braithwaite twice tell
6 me what is ambiguous about the word determining. He did not
7 provide you an answer other than to say we disagree with how
8 Crystal Lagoons is applying that term. That is not a
9 dispute over language. That is a dispute over factual
10 matters with regard to infringement, and apparently factual
11 matters with regard to invalidity, and that is fine and we
12 will someday have that discussion with regard to whether in
13 fact Cloward's engineers determine.

14 Bill, can you bring up claim one of the 520
15 patent? I want to point out something to the Judge first.

16 One of the things that Mr. Braithwaite said that I
17 think makes the point I just made clear -- Bill, if you can
18 blow up the first two -- no. Excuse me. The first two
19 lines of number one. Right here, if you can see my finger.
20 Make that bigger, please. Thank you. Perfect. There you
21 go. Make that as big as you can.

22 When Mr. Braithwaite was trying to answer your
23 question about what is ambiguous about the word determining,
24 he said, you know, the engineers in Provo are being accused
25 of sitting in their chairs and maintaining the lagoon in

1 Florida, but that is not what this claim says. This claim
2 says a method for controlling microbiological properties.
3 Method for controlling. That gets to my whole point.

4 I think Your Honor has grasped the temporal issue
5 here, which is can determining as part of controlling the
6 chemistry in a lagoon be done during the design? The answer
7 is absolutely.

8 Now, this gets into factual things, but I am going
9 to show it anyway because Mr. Braithwaite mentioned it.

10 Bring up the purple and orange photo.

11 One of the ways that that is done is by putting
12 more nozzles in certain areas. That comes from the design.
13 So this is part of the design of the lagoon at a Hard Rock
14 Hotel. You can see that the Cloward designers in Provo,
15 Utah created many more inlets in the swimming area than they
16 did in the rest of the lagoon. So that is a determination
17 as to the microbiological content in that lagoon. Of course
18 it is going to be measured later to confirm. You called it
19 an assumption. I call it determining. That determination
20 will be confirmed, but it can be done temporally before and
21 that is why there is nothing wrong with the word
22 determining.

23 Bill, finally if you could just bring up column 11
24 of the 520 patent, lines 22 to 33.

25 Again, going back to the intrinsic evidence, we

1 asked ourselves where is the ambiguity? Is the claim
2 ambiguous? No, it is not. It uses the word determine, a
3 common word and easy to understand. There may be a dispute
4 as to application, but that is not for today. Nothing in
5 the file history. The patent owner didn't say anything.
6 Can we use sticking a probe in there? So Mr. Braithwaite is
7 left with trying to find something in the specification, but
8 it is not there.

9 Bill, if you could blow up column 11, lines 22 to
10 33. Blow up is not a very technical term. 22 to 33. There
11 we go. Try one more time.

12 I am sorry. Maybe I have this wrong. Maybe it is
13 column 15, lines 22 to 33. It is what Mr. Braithwaite had
14 on the screen a moment ago.

15 I apologize, Your Honor.

16 Keep going. 22 to 33. There we go. There it is.
17 Good.

18 So what Mr. Braithwaite had you focus on was the
19 fact that in the patent specification -- it does not say it
20 has to be this way. It says can be. If you're looking for
21 a disclaimer where you would change the word determining to
22 mean something narrower, you would have to see, like, must,
23 always, and you don't. It just says can be determined. So
24 it says one way you can do it and then he listed off all
25 these fancy science gadgets. That is fine and good.

1 What he left off was at the bottom where it says
2 or may be publicly known, right, and that is certainly
3 temporally before. You wouldn't have public knowledge --
4 you know, there is no public knowledge of what the
5 temperature is in this room. That public knowledge as to
6 what the temperature should be in this room would have been
7 before this room was designed. Or it can be information
8 from other sources, among others, calculations, engineering
9 books.

10 The same thing with temperature. Mr. Braithwaite
11 talked about all these fancy science instruments. I am not
12 even going to try to pronounce them. He left off the end
13 where it says or may be publicly known or can be informed
14 from other sources.

15 THE COURT: The universe of other subjects -- you
16 know, I am always amazed at the redundancy that occurs in
17 matters of this kind, but I think you made your point, but I
18 think that we'll probably indicate that no construction is
19 necessary at this point in reference to that particular
20 matter.

21 MR. ZEULI: Thank you, Your Honor.

22 THE COURT: What is left, if anything?

23 MR. BRAITHWAITE: I think those are all the terms,
24 Your Honor.

25 THE COURT: Okay. You have got a pending motion

1 you tell me and it may or may not be the subject of
2 reconsideration by you after the determinations that have
3 been made today, but I will not worry about that. That is
4 your problem. If there is a response down the road, we'll
5 set it down. Maybe we have set it down already. I don't
6 know whether we fixed a date already.

7 Eventually we're going to get to pretrial, and I
8 want to emphasize in reference to pretrial, disputed issues
9 identified, both legal and legal propositions, a roster of
10 all of your witnesses for your respective cases in chief,
11 not rebuttal, cases in chief, a roster of all of your
12 exhibits for your respective cases in chief. If you have
13 common exhibits, you ought to work together to get them in
14 without worrying about foundation if they are offered by
15 both sides.

16 Have we yet fixed a pretrial date? We have, have
17 we not?

18 MR. BRAITHWAITE: No, Your Honor, we have not.

19 THE COURT: Okay. Tell me the date that you have
20 for your motion.

21 MR. BRAITHWAITE: Your Honor, the pending motion
22 right now is set for October 7th, I believe.

23 THE COURT: Okay. Well, let's deal with that, and
24 either deal with that beforehand or deal with that, and on
25 that date we'll give you a pretrial date at that time. But

1 in anticipation of the fact that we're moving ahead as best
2 we can with the resurgence, think about what generally is in
3 dispute and think about what witnesses are going to be
4 helpful to us and who knows what. Think about exhibits.

5 Anything else that we need to talk about at this
6 point?

7 MR. BRAITHWAITE: I don't believe so, Your Honor.

8 MR. ZEULI: No, Your Honor.

9 THE COURT: Thanks a lot. Appreciate your help.
10 It is an interesting case it seems to me. I think the whole
11 relationship of language and the law and how language
12 functions is intimately tied in with what we're trying to do
13 as best we can, but language itself has inherent defects,
14 and I think it is appropriate in cases of this kind that we
15 try to get behind dealing with language and look at the
16 events, what is done and what has happened and who did what
17 on an item specific basis so that we are not just discussing
18 philosophically what is going on in the world.

19 I think people should be awfully careful about how
20 they run up and down the level of abstraction that people
21 enjoy dealing with. Lawyers love to deal with high-level
22 abstractions. I think, as a practical matter, all of us
23 need to deal with specificity and simplicity and identity
24 with an accurate label of what it is that we're talking
25 about, in spite of the fancy rules that may exist. The

1 specificity of specific things is going to be terribly
2 important in my opinion. Quite frankly, high-level
3 abstractions just don't cut it.

4 Thank you for your help.

5 We'll be in recess and we'll see you down the
6 road.

7 MR. BRAITHWAITE: Thank you, Your Honor.

8 THE COURT: Okay.

9 (Proceedings concluded.)

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